LAW OF INDIAN RAILWAYS

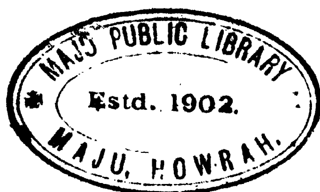
AND

COMMON CARRIERS

BY

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CALCUTTA
THACKER, SPINK, & CO.
BOMBAY: THACKER & CO., LD. MADRAS: HIGGINBOTHAM & CO.
1880

PREFACE.

THIS work is intended as a commentary upon the Indian Railway Act of 1879 and the Carriers' Act of 1865, and is, I believe, the first attempt which has been made to embody in the form of a treatise the decisions of the High Courts of India and of the Superior Courts of England upon the law of Carriers.

In the course of an experience of many years in con ducting cases in the Courts of India on behalf of the East Indian and other Railway Companies, I have often felt, and seen much inconvenience caused by, the want of a special work on the duties, rights, and liabilities of carriers, and considering the great importance to which this branch of the law has attained, owing to the development of the railway system in India, it is strange that no book on the subject has been previously published.

The new Railway Act, which became law last year,

the Carriers' Act, and the Act usually known as Lord Campbell's Act (xiii. of 1855) which enables compensation to be recovered on the death of a person killed by the wrongful act, neglect, or default of another, will be found in the work, together with such sections and quotations from the Merchant Shipping Acts, the Contract Act, the Railway and Canal Traffic Act, the Civil Procedure Code, the Court Fees Act, and the Statute of Limitations, as apply to Carriers by land or water.

I have carefully collated and introduced such rulings of the High Courts of India as are applicable to the subject, and have supplemented them by a number of the leading decisions of the House of Lords, the High Court of Appeal, and the Courts of Queen's Bench, Exchequer, and Common Pleas of England and of Ireland.

In submitting the work for the indulgent support of the profession and the public generally, I can only give an assurance that, whatever its demerits may be, no effort has been wanting on my part to render it a reliable and exhaustive practical Law Book.

W. GORDON MACPHERSON.

LONDON: *August* 1880.

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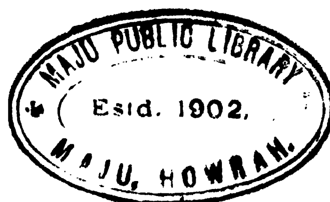


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THE

LAW OF INDIAN RAILWAYS,

&c.

PART I.

THE LAW OF CARRIERS.

CHAPTER I.

OF THE LAW OF CARRIERS GENERALLY.

THE law relating to carriers, like the *lex mercatoria* or law merchant, is a special or customary law, and forms a distinct branch of the common law, founded upon the customs, duties and obligations of carriers as approved and regulated by successive statutory enactments and judicial decisions. From the earliest ages the responsibilities and duties of public carriers have formed a recognized rule of law in the jurisprudence of most civilized nations, and the modern law on the subject may be said to be founded upon the Prætor's Edict in the Roman law, which decreed that, if carriers did not faithfully restore the goods entrusted to them, judgment

would be given against them.[1] The reason assigned by Ulpian for this edict is that it is necessary to place confidence in such persons as carriers, and to commit the custody of goods to them; that no person ought to complain of the severity of the rule, for it is in his own choice to receive the goods of other persons or not; and unless the rule was so established, an opportunity would be afforded to them to combine with thieves against those who trusted them, whereas they now have an inducement to abstain from such combinations.[2]

Under the Roman law not only was a carrier bound to restore the goods that had been entrusted to him, but in the event of their being damaged, lost, or stolen while in his custody, the owner could claim double the value of the goods.[3] The principle laid down by Gaius is, that although a carrier did not receive hire for mere custody, but for carriage of the goods, yet he is bound for the custody of the thing, in like manner as fullers or menders of clothes are bound for the custody of the thing, and they are answerable *ex locatio* for ordinary negligence, although they receive their compensation not strictly for custody, but for the exercise of their art.[4]

The first clear exposition of the duties and responsibilities of public carriers according to the law of England is contained in the leading case of *Coggs* v. *Bernard*, tried in the reign of Queen Anne, one of the most celebrated cases ever decided in Westminster Hall; and the principles laid down in that decision form the

[1] For Notes see end of book.

foundation of both the English and Indian law relating to carriers.

The defendant Bernard had undertaken gratuitously to remove some hogsheads of brandy from one cellar at A. to another cellar at B., and there lay them down safely; but he managed their removal so negligently, that for want of care in him, one of the casks was staved, and a great quantity of brandy was spilt. After a verdict for the plaintiff had been recorded, there was a motion in arrest of judgment, on the ground that the declaration was insufficient and bad, because the defendant was neither laid to be a common porter, nor that he was to have any reward for his labour, so that the defendant was not chargeable by his trade. The case being thought to be one of great consequence, it was argued before the whole Court, and held that the defendant was liable, although he was to receive neither hire nor reward for the carriage and removal of the casks.

The Court, *per Holt*, C.J., laid down the law generally as regards bailments, and the following is an extract from the judgment, showing the opinion of the Court on the two classes of bailment of which carriers are bailees.

Holt, C.J.: 'I have had a great consideration of this case, and because some of the books make the action to lie upon the reward, and some upon the promise, at first I made a great question, whether this declaration was good. But upon consideration, I think the action

will well lie. In order to show the grounds upon which a man shall be charged with goods put into his custody, I must show the general sorts of bailments. And there are six sorts of bailments. The first sort of bailment is, a bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor; and this I call a *depositum*. The second sort is, when goods or chattels are lent to a friend *gratis*, to be used by him; and this is called *commodatum*, because the thing is to be returned *in specie*. The third sort is, when goods are left with the bailee to be used by him for hire; this is called *locatio et conductio*, and the lender is called *locator*, and the borrower *conductor*. The fourth sort is, when goods or chattels are delivered to another as a *pawn*, to be a security to him for money borrowed of him by the bailor; and this is called in Latin, *vadium*, and in English, a pawn or pledge. The fifth sort is, when goods or chattels are delivered to be carried, or something is to be done about them for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them. The sixth sort is, when there is a delivery of goods or chattels to somebody who is to carry them, or do something about them *gratis*, without any reward for such his work or carriage, which is this present case.

'As to the fifth sort of bailment, viz., a delivery to carry or otherwise manage for a reward to be paid to the bailee, these cases are of two sorts; either a delivery

to one who exercises a public employment, or a delivery to a private person. If it be to a person of the first sort, and he is to have a reward, *he is bound to answer for the goods at all events.* And this is the case of the common carrier, hoyman, master of a ship, &c. The law charges this person, thus entrusted to carry goods, against all events but acts of God and of the enemies of the Queen. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law for the safety of all persons the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point.

'As to the sixth sort of bailment, it is to be taken that the bailee is to have no reward for his pains, but yet that by his ill-management the goods are spoiled. Secondly, it is to be understood that there was a neglect in the management. But thirdly, if it had appeared that the mischief happened by any person that met the cart in the way, the bailee had not been chargeable. As if a drunken man had come by in the streets, and had pierced the cask of brandy; in this case the

defendant had not been answerable for it, because he was to have nothing for his pains. Then the bailee having undertaken to manage the goods, and having managed them ill, and so by his neglect a damage has happened to the bailor, which is the case in question, what will you call this? In *Bracton*, lib. 3, 100, it is called *mandatum*. It is an obligation which arises *ex mandato*. It is what we call in English an acting by commission. And if a man acts by commission for another *gratis*, and in the executing his commission behaves himself negligently, he is answerable.

'The reasons are, first, because, in such a case, a neglect is a deceit to the bailor. For when he entrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him. And a breach of a trust undertaken voluntarily will be a good ground for an action.

'But, secondly, it is objected that there is no consideration to ground this promise upon, and therefore the undertaking is but *nudum pactum*. But to this I answer, that the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management. Indeed, if the agreement had been executory, to carry these brandies from one place to the other such a day, the defendant had not been bound to carry them. But this is a different case, for *assumpsit* does not only signify a future

agreement, but in such a case as this it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing. And so a bare being trusted with another man's goods must be taken to be a sufficient consideration, if the bailee once enter upon the trust, and take the goods into his possession.'[5]

The soundness of the policy thus set forth in Chief Justice Holt's judgment of subjecting public carriers to extraordinary responsibility where extraordinary confidence is necessarily reposed in them, and there is great temptation to fraud, or danger of plunder, can hardly admit of question. When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows, or sends any servant with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove any of these causes of loss. His witnesses must necessarily be the carrier's servants, and they, being interested, and knowing that they could not be contradicted, would excuse their masters and themselves. To give due security therefore to property, the English law has added to that responsibility of a carrier which immediately arises out of his contract to

carry for a reward—namely, that of taking all reasonable care of it—the responsibility of an insurer. From this liability as an insurer a carrier is only to be relieved, in general, by two things, both so well known to all the country when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not: these are the acts of God and of the Queen's enemies, unless his responsibility is limited or otherwise declared by statute.[6]

This principle of extraordinary responsibility, derived, as we have seen, from the Roman law, has insinuated itself into the jurisprudence of most of the nations of Europe, and forms the basis of the law relating to carriers in the United States of America. But the rule in the civil law was not carried to the severe extent of the English common law. So, in France, common carriers are not liable for losses resulting from superior force, as robbery, for that comes within the *damnum fatale* of the civil law which exempted the carrier.[7] In Scotland, loss by fire is also considered as one happening by inevitable accident, and for which the carrier is not responsible. But in America, as in England, the carrier is liable for losses arising from accidental fire.

The principles of the law of bailment as laid down by Holt, C.J., in *Coggs* v. *Bernard*, have for years been adopted by the local courts as applicable to India,[8] and the common law liability of public carriers in India

was, until very recently, the same as that of common carriers in England.[9]

The only Indian statutes which directly and specially legislate for carriers by railway and common carriers are the Railway Act of 1879, and the Carriers' Act of 1865, both of which are, however, more or less abridged or modified copies of the corresponding English Acts. So that, in questions affecting the legal duties, rights, and responsibilities, of carriers, the judges have, in the absence of statutory provision, to be guided by the established precedents and admitted maxims of this particular law as laid down by the High Courts of India, and, failing these, the recorded decisions of the Superior Courts of England, where the law administered and the principles involved are substantially the same, should be held to afford the best evidence of what the law really is in such cases.

The Indian Contract Act of 1872, according to the interpretation put upon the part of it relating to bailments by the High Court of Bombay in December 1878, made an important alteration in the law relating to carriers as regards their liability for loss of or damage to goods carried by them; and it would appear from this ruling that carriers in India are no longer in the position of insurers, as they have hitherto been held to be at common law.

Chapter ix. of the Contract Act, in declaring the law of bailment in India, enacts:—

§ 148. 'A bailment is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the bailor. The person to whom they are delivered is called the bailee.

'*Explanation.*—If a person, already in possession of the goods of another, contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor of such goods, although they may not have been delivered by way of bailment.

§ 149. 'The delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee, or of any person authorised to hold them on his behalf.

§ 150. 'The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

'If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed.

§ 151. 'In all cases of bailment, the bailee is bound to take as much care of the goods bailed to him as a

man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality, and value as the goods bailed.

§ 152. 'The bailee, in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151.

§ 153. 'A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed inconsistent with the conditions of the bailment.

§ 154. 'If the bailee makes any use of the goods bailed, which is not according to conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from, or during, such use of them.

§ 155. 'If the bailee, with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced.

§ 156. 'If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damage arising from the mixture.

§ 157. 'If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods, and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.

§ 158. 'Where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.

§ 159. 'The lender of a thing for use may at any time require its return, if the loan was gratuitous, even though he lent it for a specified time or purpose. But if, on the faith of such loan, made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss, exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefit so derived.

§ 160. 'It is the duty of the bailee to return or deliver, according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished.

§ 161. 'If, by the fault of the bailee, the goods are not returned, delivered, or tendered at the proper time, he is responsible to the bailor for any loss, destruction, or deterioration of the goods from that time.

§ 162. 'A gratuitous bailment is terminated by the death either of the bailor or of the bailee.

§ 163. 'In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.

§ 164. 'The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, nor to receive back the goods, or to give directions respecting them.

§ 165. 'If several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all, in the absence of any agreement to the contrary.

§ 166. 'If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to the directions of the bailor, the bailee is not responsible to the owner in respect of such delivery.

§ 167. 'If a person, other than the bailor, claims goods bailed, he may apply to the Court to stop the delivery of the goods to the bailor, and to decide the title to the goods.

§ 168. 'The finder of goods has no right to sue the

owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and find out the owner, but he may retain the goods against the owner until he receives such compensation ; and where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he receives it.

§ 169. 'When a thing, which is commonly the subject of sale, is lost, if the owner cannot with reasonable diligence be found, or if he refuses, upon demand, to pay the lawful charges, the finder may sell it—

'(1) when the thing is in danger of perishing or of losing the greater part of its value; or

'(2) when the lawful charges of the finder, in respect of the thing found, amount to two-thirds of its value.

§ 170. 'Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods, until he receives due remuneration for the service he has rendered in respect of them.

§ 171. 'Bankers, factors, wharfingers, attorneys of a High Court, and policy-brokers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a

security for such balance, goods bailed to them, unless there is an express contract to that effect.

§ 172. 'The bailment of goods as security for payment of a debt or performance of a promise is called a pledge. The bailor is in this case called the pawnor. The bailee is called the pawnee.

§ 173. 'The pawnee may retain goods pledged, not only for payment of the debt or the performance of the promise, but for the interest of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

§ 174. 'The pawnee shall not, in the absence of a contract to that effect, retain the goods pledged for any debt or promise, other than the debt or promise for which they are pledged; but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee.

§ 175. 'The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.

§ 176. 'If the pawnor makes default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.

'If the proceeds of such sale are less than the

amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

§ 177. 'If a time is stipulated for the payment of the debt, or performance of the promise for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them; but he must, in that case, pay, in addition, any expenses which have arisen from his default.

§ 178. 'A person who is in possession of any goods, or of any bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate or warrant or order for delivery, or any other document of title to goods, may make a valid pledge of such goods or documents:

'Provided that the pawnee acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly:

'Provided also, that such goods or documents have not been obtained from their lawful owner, or from any person in lawful custody of them, by means of an offence or fraud.

§ 179. 'Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

§ 180. 'If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

§ 181. 'Whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests.'

In the case of *Kuverji Tulsidass* v. *The Great Indian Peninsular Railway Company*, which was decided by the High Court of Bombay on 7th December, 1878, on a reference from the judge of the Court of Small Causes, it was held that the English common-law rule, under which common carriers are held liable as insurers of goods against all risks except the acts of God and of the Queen's enemies, is not now in force in India; and that in cases not met by the special provisions of the Acts relating to carriers by railway and common carriers, the liability of such carriers for loss of or damage to goods entrusted to them is that prescribed by Sections 151 and 152 of the Contract Act of 1872, as above quoted.

The facts of this case were as follows :—

The plaintiff's goods were being carried in a train of the defendants' from Nángoan to Egatpura. During the journey the train was plundered by robbers, and the

plaintiff's goods were stolen. In an action for the value of the goods, the Chief Judge of the Court of Small Causes prevented the defendants' attorney from giving evidence to show that the robbers were not the servants of the railway company, and that all reasonable precautions had been taken for the safety of the goods, the protection of the train, and the watching of the line; but, treating the defendants as insurers against all risks, decreed the suit in favour of the plaintiff, referring, however, the following point for the decision of the High Court. 'Can the defendants, as bailees defined in Section 148 of the Contract Act of 1872, rely on the provisions of Section 152 of that Act as protecting them from liability in respect of goods carried by them for reward?'

Westropp, C. J., in delivering the judgment of the High Court, said: 'He (the Chief Judge) has put the same question in another case (*Ishvardass* v. *The Great Indian Peninsular Railway Company*), referred to this Court, in which case he stated his reasons for not permitting the railway company to rely on § 152 of the Indian Contract Act. Those reasons may be summarised thus: that although that Act (the Contract Act) has been in force six years, no judicial authority was cited to show that Section 152 applies to carriers for reward, and although many actions had been tried in the Court of Small Causes against the Great Indian Peninsular Railway Company, such a defence had never been raised

in these actions: that although the terms of Section 148 are wide enough to include all carriers, yet Sections 151 and 152 only declare the law as it existed before the Indian Contract Act came into force, in regard to ordinary bailees other than carriers, side by side with which there also existed the special common-law liability of common carriers, who nevertheless then, as now, fell within the strict letter of the definition of ordinary bailees, which special liability of common carriers had been 'apparently recognised' by the legislature in the Railway Act of 1854 and the Carriers' Act of 1865: that the preamble and Section 1 of the Contract Act showed that it was not intended to be exhaustive and applicable to all questions of bailment, and that Act is silent as to the Railway Act, the Carriers' Act, and carriers for hire, the only reference to carriage in the chapter on bailments being in Section 158, where the bailment dealt with is gratuitous bailment.

The Indian Contract Act is and purports to be only a partial measure. Its preamble recites: 'Whereas it is expedient to define and amend certain parts of the law relating to contracts;' and that 'nothing herein contained shall affect the provisions of any statute, act or regulation not hereby expressly repealed, nor any usage of trade, nor any incident of any contract not inconsistent with the provisions of this Act.'

The words 'not inconsistent with the provisions of this Act' must, we think, be limited in their application

to the immediately preceding words, 'nor any usage or custom of trade, nor any incident of any contract,' and are not applicable to the words, 'the provisions of any statute, act, or regulation,' and therefore the Railway and Carriers' Acts, not being mentioned in the Schedule to the Contract Act, are not repealed or affected by that Act. The provision of the first section, that nothing contained in the Schedule to the Contract Act shall affect any usage or custom of trade, or incident of any contract not inconsistent with the provisions of the Act, does not aid us in arriving at a solution of the question submitted to this Court; inasmuch as, if the 152nd Section of the Act is applicable to common carriers, the Act is in that respect inconsistent with the rule or usage of the common law relied upon by the Court of Small Causes as the basis of its opinion. That case is, that a common carrier is bound to take the utmost care of goods entrusted to him, and, unlike other bailees falling under the fifth class of bailment, *Locatio operis faciendi*, is at common law responsible for their loss, and every injury sustained by them, occasioned by any means whatever, except the acts of God and of the Queen's enemies.

The 151st Section of the Contract Act is as follows: 'In all cases of bailment, the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality, and

value as the goods bailed;' and the 152nd Section enacts that 'the bailee, in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed, if he has taken the amount of care of it described in Section 151.'

If, indeed, the rule of the common law already mentioned, and which makes the common carrier an insurer of goods against all loss and injury not occasioned by the act of God or the Queen's enemies, has been adopted by the Indian legislature in Act xviii. of 1854 and Act iii. of 1865, or any other Act not mentioned in the Schedule to the Contract Act, the first section of that Act would save the rule. It has not, however, been shown to our satisfaction that the common law has been adopted in Act xviii. of 1854 or Act iii. of 1865, or any other Act of the Indian legislature.

The important sections in the Railway Act (xviii. of 1854) in relation to the liability of railway companies for goods delivered to them, is contained in Sections 9, 10, 11, and 15. Of these, Section 9 relieves them of liability in respect of loss or injury to passengers' luggage in 'any case,' unless it shall have been booked and paid for; and Section 10 of responsibility 'in any case' for excepted articles. It is manifest that neither of these sections states or implies what, in the case of goods not within the descriptions therein given, shall be the extent of the liability of railway companies; nor do these sections state what, in the case of loss or

injury to goods therein described, shall be the extent of the liability of railway companies when the requisites to render them at all liable have been complied with.

The silence of those sections leaves the solution of that point to the law, as it then subsisted, outside that Act; and a variation of such law *dehors* the Act cannot be deemed to affect the provisions of the Act.

The two sections of which we have been treating are in favour of railway companies. The next section (the 11th) of the same Act has a different aspect. At common law, an ordinary carrier for hire might, by special contract, protect himself from responsibility, even for loss or injury occasioned by himself or his agents. In the case of *Suratram* v. *The Great Indian Peninsular Railway Company*, it was said that the 11th Section, taken in the aggregate, appears to mean 'that the railway company shall be responsible for loss or injury caused by gross negligence or misconduct by their agents or servants, except in cases specially provided for by the Act: *e.g.* such cases as mentioned in Sections 9 and 10, notwithstanding any public notice or private contract to the contrary.'

If, as we think, that be the true construction of Section 11, it leaves untouched the question whether railway companies, as common carriers, shall be answerable, in cases of loss or damage to goods, in the absence of any special contract to the contrary, where such loss or damage is not occasioned by negligence or

misconduct of the company, their servants, or agents. That question, if it arose before the Contract Act came in force, would necessarily have been decided by the common law, which would have treated the common carrier as an insurer against all risks, except the act of God and the Queen's enemies; and if the loss had not been attributable to either of these exceptions, would have held the common carrier liable, although neither misconduct nor negligence had occurred on his part, or on that of his agents or servants. If this be no longer so since Section 152 of the Contract Act came into force, the change thus made is but a departure from the common law.

Section 15 of the Railway Act (xviii. of 1854) relates to carriage of dangerous goods, and sheds no light on the liability of the railway companies free from the imputation of negligence or misconduct.

Act iii. of 1865 (the Carriers' Act) is intituled an Act relating to the Rights and Liabilities of Common Carriers, and in its preamble recites that 'it is expedient not only to enable common carriers to limit their liability for loss of, or damage to, property delivered to them to be carried, but also to declare their liability for loss of, or damage to, such property occasioned by the negligence or criminal acts of themselves, their servants, or agents.' This preamble, therefore, betrays no intention on the part of the legislature to fix on the common carrier the character of an insurer against all risks except the act of God or the Queen's enemies.

The 2nd Section declares that in the Act 'common carrier' denotes a person, other than the Government, engaged in the business of transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately, and that 'person' includes any association or body of persons, whether incorporated or not. The 3rd Section in effect enacts that no common carrier shall be liable for loss of, or damage to, property delivered to him to be carried, exceeding in value one hundred rupees, of the description contained in the Schedule to the Act, unless the person delivering such property or his authorised agent shall have expressly declared to such carrier or his agent the value and description thereof. The 4th Section relates to the rate to be charged in the cases mentioned in the preceding section; and the 5th Section provides for a refund of such charge in the event of loss or damage to the goods in such cases.

With respect to property other than that specified in the Schedule to the Act, the 6th Section prevents any common carrier from limiting or affecting his liability by any public notice, and provides that any such carrier may by special contract limit his liability if the contract is signed by the owner of the property or his recognised agent. This 6th Section does not lay down what shall be the extent of the common carrier's liability if he do not limit it by special contract, but leaves that question to be determined by the common

law. If that liability has been varied by the Contract Act, it is the common law and not the 6th Section that has been interfered with.

The 7th Section prevents the owner of a railroad or tramroad, constructed under the provisions of Act xxii. of 1863, from limiting his liability by any special contract, and declares that such owner shall be liable for the loss of, or damage to, property delivered to him to be carried, only when such loss or damage shall have been caused by negligence or criminal act on his part or on that of his servants or agents. This is the first mention of negligence in the enacting part of the Act, and no measure is given whereby to determine what constitutes such negligence; or, in other words, there is not any statement as to the amount of care which the owner of the railroad or tramroad is bound to take of the property entrusted to him for carriage. Hence subsequent legislation defining the amount of care to be taken would not be an interference with Section 7.

The 8th Section is as follows: 'Notwithstanding anything hereinbefore contained, every common carrier shall be liable to the owner for loss of, or damage to, any property delivered to such carrier to be carried, where such loss or damage shall have arisen from the criminal act of the carrier or any of his agents or servants.' Here, again, the measure of negligence being omitted, the same remark as made on Section 7 is applicable. The 9th Section in effect relieves the

plaintiff from the onus of proving that the loss of, or damage to, his goods was owing to the negligence or criminal act of the carrier or his agents or servants; and the 10th Section provides that nothing contained in the Act shall affect the provisions contained in Sections 9, 10, and 11 of Act xviii. of 1854.

We must now revert to the Contract Act. It has already been shown that the preamble is not exhaustive; but, on the other hand, when we turn to the chapter on bailments, we find at its commencement, in Section 148, the following definition of a bailment:—'A bailment is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the bailor. The person to whom they are delivered is called the bailee.'

That definition is not narrowed by any subsequent provision in that chapter, and is sufficiently comprehensive to include all bailments of the fifth class; and although not among the bailments specified down so far as Section 157, yet, unless we find the Act somewhere either expressly or by clear implication excludes bailments for the purpose of carriage from the scope of the chapter, we think that we should regard such bailments as comprised within it. So far, however, from finding any provision of that excluding character, we find

Section 158 distinctly shows that bailments of goods for conveyance were in the contemplation of the legislature in framing the 9th Chapter. That section provides that 'where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.'

Although the special provision made by Section 158 is for the benefit of gratuitous bailees only, we find in that circumstance no logical means whereby we could limit section 148 and the rest of the chapter on bailments, including Section 152, to gratuitous bailees generally or to gratuitous carriers only.

We are of opinion that the defendants are entitled to the benefit of Section 152 of the Indian Contract Act. Consequently we must set aside the decree for the plaintiff and direct a new trial, at which the defendants should be permitted to give evidence that the robbers of the plaintiff's goods were not the servants or agents of the defendants, and that the defendants by their servants and agents took as much care of the goods as a man of ordinary prudence would, under similar circumstances, have taken of his own goods of the same bulk, quality, and value.[10]

From this judgment it seems that the liability to which all public carriers are now subject is that of

bailees for hire within the meaning of the Indian Contract Act, controlled by any special provisions in the Railway Act or Carriers' Act, according to which they are subject.

Carriers Defined.—The word 'carrier' includes (1) all persons who undertake to carry goods or passengers from one specified place to another for hire or reward; and (2) all persons who voluntarily undertake to carry goods gratuitously, that is, without receiving any reward for their trouble.

Carriers are of two kinds, viz.:—

(1) Carriers of passengers by land, by inland navigation, and in ships.

(2) Carriers of goods by land, by inland navigation, and in ships.

They may also be classed as (1) carriers by railway; (2) carriers of passengers; (3) common carriers; and (4) private carriers.

Carriers by Railway.—'A carrier by railway,' under the Indian Railway Act of 1879, is one who carries upon a railway in British India open for the public conveyance of passengers or goods, and is defined, under the name of 'Railway administration,' to mean, in the case of a railway worked by Government or a native state, the manager of such railway, and in the case of a railway worked by a company or private individual, such company or individual.

A carrier by railway is not a common carrier within the provisions of the Carriers' Act of 1865.

Carriers of Passengers.—Railway administrations and canal companies, masters and owners of sea-going and inland-navigating ships, steamers, and other vessels, proprietors of dâk-carriages, stage-coaches, bullock-trains, palkees, &c., and all other persons who publicly undertake to convey passengers from one specified place to another for hire or reward, are denominated carriers of passengers. They are not common carriers within the definition of the Carriers' Act, as that term in India is only applicable to carriers of goods. A carrier of passengers is chargeable by law with the safety of the passengers he carries so far as human care and forethought will go, and is responsible for the slightest neglect.[11]

Common Carriers.—A common carrier is defined in Section 2 of Act iii. of 1865 (the Carriers' Act) as 'a person, other than the Government, engaged in the business of transporting for hire property from place to place by land or inland navigation for all persons indiscriminately.' In its wider and general sense the term includes tramroad and canal companies, masters and owners of sea-going or inland-navigating ships, steamers, flats, barges, and other vessels, proprietors of stage-coaches and stage-waggons, hoymen, wharfingers, bargemen, watermen, boatmen, ferrymen, keelmen, lightermen, and all other persons who publicly undertake the carriage of goods from one specified place to

another for hire or reward, for all persons indifferently who may choose to employ them, as a regular business, and not as a casual occupation *pro hac vice*.[12]

It has been held that a person is a common carrier if he holds himself out as ready to engage in the transportation of goods as a business, though it be not his principal business. He is as much a common carrier on the first trip in the exercise of his public employment as on any subsequent trip where he offers his services to the public to carry for hire.[13] A carrier is equally a common carrier, and subject to the law in respect to his duties and liabilities as such, although one of his *termini* be beyond the seas.[14]

At common law, any person who undertakes to carry goods for the public generally between certain designated places is, as to the liability to be imposed, a common carrier, unless the extent of his liability be expressly limited or barred by statute; and in order to charge a person as such, it is not necessary that a specified sum should be agreed on for the hire, for if none be agreed on, he is entitled to reasonable compensation. A carrier's obligation to carry is founded more upon a public duty than the particular consideration for the undertaking.[15] The hire charged by a carrier must, however, be reasonable, and consequently not more to one (though a rival carrier) than to another for the same service.[16]

The distinction between a common and a private

carrier is, that the former is obliged, by the public nature of his profession and employment, to undertake the charge of goods, which the latter is not compellable to do. The common carrier is liable in all cases for loss or damage to goods, when such loss or damage has arisen from his negligence; whereas a private carrier may, by special contract, exempt himself from such liability; but both are answerable for a *misfeasance.*

Private Carriers.—A private carrier is a person who carries goods or parcels as a casual occupation, or one who carries gratuitously as a favour to the person who entrusts the goods to him. The former is a bailee for hire, and as such may make any conditions or contract he pleases, provided such conditions are not repugnant to public policy or positive law.[17] His liability is the same as a carrier by railway and a common carrier where he has not protected himself by a special contract.

If the performance of the undertaking by the bailee be gratuitous, he is still liable for any loss which may be caused to the bailor by negligence of himself or servants; but it obviously would not be reasonable to expect from him that degree of care and diligence which might fairly be required where he is to be remunerated for his trouble, and therefore proof that he has exercised even a slight degree of care and diligence may, at least in equity, exonerate him from his responsibility as a bailee under the Contract Act.[18]

CHAPTER II.

OF THE CONTRACTS OF CARRIERS.

Contract Defined.—In its widest and most general sense, the word 'contract' signifies an engagement, obligation, or compact, which may be either unilateral or *inter partes.* A contract between two or more persons may be *executory* or *executed*, *express* or *implied.*

An *executory* contract is one in which a party binds himself to do or not to do a particular thing. A contract *executed* is one in which the object of the contract is performed. An *express* contract is one in which the terms are, at the time of making it, defined in writing or openly uttered and avowed; while, on the other hand, an *implied* contract is one which reason and justice dictate, and which the law, therefore, presumes that every man undertakes to perform. In it, accordingly, the law implies from the antecedent acts of persons what their obligations are to be; whereas, if an express contract be made, the parties themselves thereby define or assume to define them.[19] Contracts made by carriers may be either express or implied.

Proposal — Acceptance — Reciprocal Promises.— When a carrier, by public advertisement or otherwise, signifies his willingness to carry any person or goods from one given place to another on certain specified conditions, he is said to make a *proposal*, and upon any person desirous of being carried or of forwarding goods expressing his assent thereto, and signifying his willingness to fulfil the conditions laid down, such proposal is said to be *accepted*. The proposal and its acceptance, forming, as they do, the consideration for each other, are termed *reciprocal promises*, and constitute a legal contract.

Privity.—The word 'contract' properly understood involves the idea of 'privity' and of 'consent:' if there be no privity between parties there can be no contract or agreement between them. Why should a man be bound by stipulations to which he is altogether a stranger—to which he has not expressly or impliedly assented? In a recent case brought against the Great Indian Peninsular Railway Company, the plaintiff and his goods were carried by the defendants under a contract with the Indian Government, and whilst being so carried, his goods were destroyed by the defendants' negligence:—*Held*, that, although the plaintiff could not sue the defendants for non-performance of their duty as carriers for want of *privity* of contract, he was entitled to sue for an injury done to his property through their negligence whilst the goods were in their custody.[20]

Where, however, goods are transmitted through the agency of two carriers, privity may be established between the consignee and the second carrier by the payment to, and the receipt by, the latter of the freight for the whole of the distance, although the contract may have been made between the consignor and the first carrier, as the consideration for the performance of the carrier's part of the contract—*i.e.* the freight—moves from the consignee, and, by receiving the freight for the whole distance, the second carrier accepts the contract as a joint contractor with the first carrier. Thus where a consignment of jute was delivered to the Indian General Steam Navigation Company at Serajgunge, for delivery at the Eastern Bengal Railway Company's station at Sealdah, where freight was payable on delivery, and a portion of the jute was not delivered, a suit to recover its value was brought against the Eastern Bengal Railway Company:—*Held*, that the suit could not be dismissed on the ground of want of privity without further investigation.[21]

Voidable Contracts.—The contracts of carriers depend upon the principles which regulate ordinary contracts. When a passenger is induced to enter into a contract by representations which are fraudulent, that is to say, false within the knowledge of the party making them; or where the representations are, although not fraudulent, untrue in point of fact, such as to bring them under the definition of *misrepresentation* within the

meaning of the Indian Contract Act, the contract is voidable at the option of the party whose consent was so caused.

A party to a contract, whose consent was caused by such fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true; but if the party whose consent was so caused had the means of discovering the truth with ordinary diligence, or if such fraud or misrepresentation did not cause him to consent to the agreement, then the contract is not voidable. Whether any particular representation is essential depends upon the intention of the parties as apparent from the contract and the surrounding circumstances. Thus, where statements were made to a passenger by a shipowner that the ship would sail on a particular day, but she did not do so, and consequently the passenger refused to go, the jury were directed that if the day fixed was not understood to be essential, and the ship sailed within a reasonable time, the shipowner was entitled to recover one-half the passage money, this being shown to be the usage of the trade.[22]

Special Contracts of Carriers.—All carriers, except owners of tramroads and railroads constructed under Act xxii. of 1863, may limit their liability for loss, destruction, or deterioration of, or damage to, property entrusted to them by special contract, provided such

special contracts are not repugnant to positive law or public policy.[23]

Every agreement purporting to limit the liability imposed on a carrier by railway by Sections 151 and 161 of the Indian Contract Act of 1872 is void, unless it is in writing, signed by, or on behalf of, the person sending or delivering the property to be carried, and is otherwise in a form approved by the Governor-General in Council.[24]

In like manner every agreement or notice limiting or affecting the liability of a common carrier is void unless such agreement is signed by, or on behalf of, the person sending or delivering the property to be carried.[25]

A private carrier may, either as a bailee for hire or a mandatary, impose what reasonable conditions he may think fit in restraint of his liability, provided such conditions are not opposed to positive law or public policy.

When the conditions of a special contract are unreasonable, so as to be repugnant to positive law or public policy, the contract is void.

Reasonable Conditions.—Section 7 of the Railway and Canal Traffic Act of 1854 (17 & 18 Vict. c. 31) enacts that carriers by railway and canals may make special contracts limiting their liability, provided such contracts are in writing, and signed by the sender of the property: otherwise any contract of the kind is void. As this rule of law has been introduced into the Indian

Carriers' Act almost *verbatim*, it may not be out of place to quote the construction that has been put upon it by the House of Lords, confirming the view taken of it by Chief Justice *Jervis* in the case of *Simons* v. *The Great Western Railway Company*. Per *Westbury*, Lord Chancellor: 'I take it to be equivalent to a simple enactment that no general notice given by a railway or canal company shall be valid in law for the purpose of limiting the common-law liability of the company. Such liability may be limited by such conditions as the court or judge shall determine to be just and reasonable, but with this proviso, that any such condition so limiting the liability of the company shall be embodied in a special contract in writing between the company and the owner or person delivering the goods to the company, and which contract in writing shall be signed by such owner or person.' [26]

All special contracts made by carriers by railway in India, to be valid, must be executed in a form approved by the Governor-General of India in Council, and when so executed it is beyond the power of a civil court to question the reasonableness of any conditions contained in them; but the contracts of other carriers are not so protected, and the civil courts have jurisdiction to determine whether their conditions are or are not reasonable.

A condition that all claims for loss of, or damage to, goods shall be made to the carrier within a fixed

time after the goods have been delivered, is just and reasonable.[27] So also, a condition that a carrier by railway will not undertake to forward goods by any particular train, or be answerable for their non-arrival in time for any particular market;[28] or that he will not be responsible under any circumstances for loss of market, or other loss or injury arising from detention to trains, exposure to weather, bad stowage, or for any cause whatever other than gross neglect or fraud;[29] or that he will not be liable for the risks attendant upon the carriage by railway of perishable articles, live animals, and fragile goods, or for accidents occasioned by the fright or restiveness of horses or cattle;[30] or loss arising from delay in forwarding ice, fish, fresh fruits, betel-leaves, vegetables, fresh meat, and other provisions, where it is impossible to know the exact condition of such provisions at the time of their delivery to be carried, and where the slightest delay in their transmission may occasion a vast loss.[31]

Where there are optional rates, conditions may of course be reasonable which would not be so when the sender has no option. In a case which has always been considered one of great authority it was held that a condition, 'that in the case of goods conveyed at a special mileage rate the carrier would not be responsible for any loss or damage, however caused,' was reasonable.[32] If the carrier offer the consignor a *bonâ fide* practical choice, either to have his goods conveyed in

the usual way at a fixed or reasonable rate, or at his own risk at a lower rate, and he elects the latter, the condition is not unreasonable.[33] The plaintiff under a contract in writing, signed by his agent, delivered to the defendants certain cheeses to be carried at 'owner's risk.' As the plaintiff knew the defendants had two alternative rates of carriage, a higher rate when they accepted their ordinary liability, and a lower rate when they were relieved of all liability, except that arising from the wilful misconduct of their servants, in using the words 'owner's risk' the plaintiff intended that the cheeses should be carried at the lower rate. The defendants' servants packed and loaded the cheeses in such a manner that during their transit they were damaged, but the defendants' servants did not know that damage would result from the manner in which the cheeses were packed:—*Held*, that as the defendants carried at alternative rates, the condition exempting them from liability when carrying at the lower rate was just and reasonable, and that the injury to the cheeses had not arisen from the wilful misconduct of their servants.[34]

The ruling of the High Court of Calcutta in a case brought against the East Indian Railway Company, to the effect that Section 11 of the old Railway Act did not restrain the liability of a carrier by railway, as a common carrier, with respect to ordinary goods, when loss was caused by gross negligence or misconduct on his

part,[35] has been superseded by Section 10 of the new Act, and the liability of such carriers is now fixed as that of bailees for hire under the Contract Act.

The liability of a carrier of passengers, even for gross negligence causing bodily hurt, may be put aside by a special contract between the carrier and the traveller. A carrier by railway, for instance, undertakes to carry a groom in charge of horses or a drover in charge of cattle in a truck, but declines liability for negligence. It is competent to the carrier to do so, and he will not in this case incur responsibility even if the negligence be gross, the contract being subject to a condition exempting him therefrom. The groom or drover is carried *gratis* under the condition that he travels at his own risk, and this excuses the carrier from liability for that which would have been legal negligence as against an ordinary passenger, the grant of a free passage being the consideration for exemption from all liability. Such a condition discharges the carrier from all responsibility for the safety of the passenger while he may be on the carrier's premises as well as during the time he is travelling.[36]

Unreasonable Conditions.—Whenever, in order to bring a carrier within the protection of a special contract, it is necessary to construe the conditions contained therein as excluding all responsibility on his part for losses occasioned by his misconduct or negligence, the contract is generally unreasonable and

unjust, and therefore void.[37] Section 8 of the Carriers' Act directly legislates on this point by declaring that nothing contained in the Act, including the provision relating to special contracts, shall excuse a common carrier from liability for loss of, or damage to, property delivered to him to be carried, where such loss or damage shall have arisen from negligence or a criminal act on his part or of any of his agents or servants.

Where a railway company accepted horses for conveyance under a special contract providing that the horses were to be carried at the risk of the owner, and that the company were not to be held responsible for *any* injury, *however caused*, to the horses while travelling upon the railway or in the company's vehicles, and the company provided rotten and insecure vehicles, so that holes were made by the horses' feet in the bottoms of the trucks and the animals were injured, it was held by the Court that the special contract did not protect the company from responsibility for the injury, as the damage did not result from any of the risks naturally incident to railway travelling, but from their own negligence in not providing proper vehicles for the conveyance of the horses.[38]

A railway company received goods to be carried under a condition absolving them from all liability for the loss of, or damage to, goods insufficiently or improperly marked, packed, directed, or described. The condition was held to be unreasonable and unjust, as

insufficient packing, marking, or directing, &c., of goods constituted no sufficient ground for relieving the company from all liability respecting the performance of the duty they had undertaken to fulfil.[39]

A proviso in a special contract exonerating a carrier by railway from all responsibility in respect to loss of, or damage to, goods occurring beyond the limits of his own line of railway from the negligence of other carriers, when such goods are booked through, is repugnant and void. But it is of course competent to a railway administration to refuse to book goods beyond its own line of railway.[40]

PART II.

CARRIERS OF PASSENGERS.

CHAPTER III.

OF THE DUTIES OF CARRIERS OF PASSENGERS.

At common law the obligation imposed on the carrier towards a passenger is to take all due care—the utmost care—to prevent any accident happening to him while *in transitu*.[41] It has been accordingly held that passenger carriers bind themselves to carry safely those whom they take into their carriages or conveyances, as far as human care and forethought will go; that is, with the utmost care and diligence of very cautious persons, and of course they are responsible for any, even the slightest, neglect.[42] If, however, there be evidence showing that the passenger has himself been guilty of contributory negligence, or of some wrong or illegal conduct with reference to the carrier, as by entering a railway carriage without a ticket and with intent to defraud the railway administration, or by

misconducting himself when there, such contributory negligence, illegal act, wrongful intrusion, or misconduct, might disentitle the passenger to redress.[43]

This obligation upon a carrier to carry passengers safely does not arise from contract, or consideration paid for the service: it is a duty imposed upon him by the law, and the promise to carry safely is implied from the duty, not the duty from the promise. Thus where a newspaper reporter travelling gratuitously upon a railway under a free pass received injuries, he recovered damages.[44] But, unless expressly prohibited by law, the carrier may make a special contract divesting himself of liability where the passenger is carried gratuitously, and this has been upheld in cases of grooms and drovers in charge of horses and cattle, who have been treated as travelling at their own risk.[45] In an American case, where a passenger, while riding gratuitously upon a railway at the invitation of the president of the railway, was injured by a collision arising from the negligence of the defendants' servants, the Supreme Court of the United States held that the company were liable for the injuries, and this ruling has been endorsed by Courts in England.[46] A passenger on a ballast or material train, run by contractors who are constructing the railway, cannot hold the contractors liable as *public carriers* for injuries received through their servants' negligence.[47]

It is a moot point whether every passenger carrier,

other than a carrier by railway, is bound to carry all persons who offer themselves to be carried. The point was raised in a suit brought against the Peninsular and Oriental Steam Navigation Company, for refusing to carry the plaintiff to Gibraltar, but it was not decided.[48] It may however be assumed that if a carrier advertise himself to the public generally, without exception, to carry any passengers who may offer themselves to be carried, he puts himself under an obligation to carry without any distinction whatever all persons who choose to accept his contract. This obligation arises from his setting himself up, like a common carrier of goods or an innkeeper, for a common public employment; and such being the case, he cannot say to a particular person, 'I will not carry you,' for that would be a breach of the contract he has offered to enter into with anybody. It seems that upon an unconditional contract to carry, a passenger carrier is bound to provide room.[49]

All carriers by railway in India are bound by statute to issue a ticket to, and carry *every* person desirous of travelling by railway, upon payment by such person of the prescribed fare; and it is obligatory upon such carriers to find room for and to convey any person who has so paid his fare to his destination. At intermediate stations, however, tickets are furnished to passengers only upon the condition that there be room in the train for which the tickets are issued; and should there not be sufficient room at such intermediate

stations for all the passengers, those who have been furnished with tickets for the longest distances are in due order to have priority of conveyance, subject to the condition that all officers and troops of her Majesty on duty and such other public servants as are specified in the Act do not claim or require preference of transport.[50]

In making this proviso regarding the issue of tickets at roadside stations, the framers of the Act doubtlessly had in view the impossibility of adding carriages to a train at such stations without delaying the other passengers, and endangering the public safety by disarranging the crossing of trains and their times of arrival at and departure from stations. Where, however, a railway carrier by advertisement or other public notification undertakes to furnish reserved or other accommodation specially at any station upon a stipulated notice being given to him, stating the accommodation required, he would not be able to shield himself under this proviso for any default if the plaintiff could prove that he had duly fulfilled the conditions set forth, and that the carrier had the necessary rolling stock available within a reasonable distance.

Carriers by railway are not excused from carrying passengers according to their contract upon the ground that there is no room for them in the train, except in cases falling within the provisions of Section 18 of the

Railway Act. It would be no answer to an action brought against a carrier for refusing to carry, that there was no room in *the particular train* for which the passenger had been booked, if it could be shown by the plaintiff that the carrier had other means at his disposal for forwarding him to his destination. In order to avail himself of this answer the carrier should make his contract conditional upon there being room.

Thus, a plaintiff paid for and received an excursion ticket at Barnsley, to go from Barnsley to London and back, and to return by any of the trains advertised for that purpose on any day not beyond fourteen days. A morning and evening return excursion train was advertised for Saturdays, but not to go to Barnsley. On a Saturday morning, within the fourteen days allowed, the plaintiff presented himself at the London station in time for the morning return train, which was full, and the plaintiff could not find a place in it, as it was dangerous to add another carriage. The company refused to allow him to go by an ordinary train, but kept him until the evening return train, in which he found a place, but was only taken as far as Doncaster. It being then Sunday, there were no trains on to Barnsley. He therefore hired a carriage and posted there, and brought his action to recover the expenses of doing so. The Court held that by the terms of the excursion ticket and the advertisement the company were bound by contract to carry the

plaintiff back to Barnsley on any day within the fourteen days that he might choose, or by any of the advertised trains that he might select; and that not sending him by the morning train was a breach of the contract, as was also the taking of him only to Doncaster instead of to Barnsley.[51]

All carriers of passengers are bound to provide conveyances reasonably strong and sufficient for the journey, with suitable equipment, such as engines, horses, harness, lamps, or other gear, and to make a proper examination thereof previous to each journey. In other terms, they are bound to provide roadworthy vehicles suitable to the safe transportation of the passengers. In this respect there does not seem to be any difference between a carriage or coach which is not roadworthy, and a ship which is not seaworthy, as to the implied obligations of the owner.[52]

In addition to being under an obligation to provide safe and roadworthy engines and carriages, and skilful drivers, carriers by railway are bound to see that their railroads and bridges are well constructed and in good repair, that their signals are effective, and that their stations are well lighted, and they are responsible for any neglect. Thus, where a passenger on a railway brought an action for injuries sustained by the breaking down of a bridge on the line, alleged to have been improperly made, but which was constructed under the superintendence of a competent engineer, it was held

that the judge rightly directed the jury to consider whether the bridge had been constructed and maintained with sufficient care and skill and of reasonable proper strength, having regard to the purposes for which it was made.[53]

It was formerly held that a carrier was liable for an accident due to an original defect in the construction of his vehicle, although the defect was out of sight and not discoverable upon ordinary examination, and could not be seen at the time of construction, as well as for a defect which might exist afterwards and be discovered upon investigation; but this has been overruled, and it has since been decided that, although public carriers who undertake to carry passengers for hire are bound to use the utmost care, skill, and vigilance in everything that concerns the safety of the passengers, they do not undertake to warrant the roadworthiness of the carriages they employ, and consequently are not responsible for an accident to a passenger arising from a latent defect in one of their carriages, such as a flaw in a wheel or axle, if the defect was of such a nature that it could neither be guarded against in the process of construction nor discovered by skilful examination.[54]

In an action against a railway company for an injury alleged to have been caused by the negligence of the defendants or their servants, the negligence suggested being the use of engines or machinery with a flaw or defect which ought to have been observed, the question

is not whether, according to evidence of a speculative or scientific nature, the defect might possibly have been discovered, but whether *practically* and by the use of reasonable care it ought to have been observed.[55] But the carrier is liable in a case where the defect could have been detected by the exercise of reasonable skill and care, for otherwise he might buy ill-constructed or unsafe vehicles, and the passenger would be without remedy.[56]

The issue of a ticket or any assent on the part of the carrier to the request of a person desirous of being carried at once constitutes that person a passenger, and the carrier becomes charged with the duty of seeing to the safe conveyance of such passenger as far as human forethought and care will go. It is not necessary in order to charge the carrier with liability that the fare for the journey should have been accepted by him, a tender of it or mere readiness to pay having been held to be sufficient.[57] An assent may be given by act as well as in words. Thus, where the plaintiff held up his finger to the driver of an omnibus, who stopped to take him up, and just as he was putting his foot on the step, drove on and he was injured, it was held that the stopping of the omnibus implied a contract to take up the plaintiff as a passenger, and therefore he was entitled to recover for the consequences of the defendant's negligence in driving on.[58]

So in an action against a defendant who hired out

chaises for refusing to carry the plaintiff, it was proved that the plaintiff got into the chaise and had his luggage tied on, when the defendant insisted upon prepayment of an exorbitant hire. The plaintiff tendered the regular fare, and the sum which had been agreed on, but it was refused. Lord *Ellenborough* held that, although the owner might make his own regulations or any special contract, yet if the plaintiff were seated in the chaise and tendered the money, the carrier was bound to proceed and to complete the journey.[59] This ruling would also be applicable to a letter-out of dâk-carriages, and other Indian conveyances of the kind.

If a person is in a railway carriage by the permission or license of the railway administration, as a free passholder, he is a passenger. Thus in a suit brought against the Great Northern Railway Company it was shown that reporters on the staff of *Bell's Life in London* when going to races to report for that journal were allowed to travel free by the company. The plaintiff, acting *bonâ fide* as such a reporter, was supplied with a free pass, which bore the name of a person, other than the plaintiff, connected with the paper, with the words 'not transferable,' and with a memorandum that any other person using it than the person named would be liable to a penalty, as if he had not paid his fare. The plaintiff showed this pass to one of the company's servants at the station, who said it was all right, and opened a carriage door for him to enter. In

the course of his journey he received an injury through the negligence of the company's servants, and in answer to the action brought by him to recover damages the company pleaded that he was not lawfully in their carriage. But it was held that there was evidence of his being lawfully in the carriage.[60]

But though carriers are thus bound to carry passengers, and to take measures for their safety while in transit, the duties of the former as well as the rights of the latter have prescribed limits and implied qualifications. Thus for example passengers by railway, road, or river must submit to such reasonable regulations as the carrier may adopt for the convenience and comfort of the other passengers and for his own private interest. The person wishing to be a passenger must be in a fit state as to sobriety, health, sanity, and conduct to associate with other passengers. No carrier by railway or other carrier of passengers is therefore bound to carry any person who is suffering from an infectious disease in such a way as to be a source of danger, annoyance, or discomfort to the other passengers, or one who is insane, or drunk, or who is of notoriously bad livelihood, as a well-known dacoit or pickpocket.[61]

The master of a passenger ship may refuse to receive on board any person who is in such a state, by drunkenness or otherwise, or so misconducts himself, as to cause annoyance to the other passengers; and has a right to exclude anyone from the table at which the passengers

mess for conduct unbecoming a gentleman ; a threat of violence towards himself would certainly justify him in doing so.[62]

In the leading American case of *Jenks* v. *Coleman*, the plaintiff sought to recover damages for having been refused a passage by the defendant's steamboat, although it was admitted by him that the sole object he had in view in travelling by the defendant's vessels was to tout for passengers to travel by his stage-coaches at the end of their river journey instead of by the coaches of a company in which the defendant had an interest, and the Supreme Court laid down the following rule :—

'There is no doubt that this steamboat is a common carrier of passengers for hire ; and therefore the defendant, as commander, was bound to take the plaintiff as a passenger on board if he had suitable accommodation, and there was no reasonable objection to the conduct or the character of the plaintiff. The right of passengers to a passage on board a steamboat is not an unlimited right. But it is subject to such reasonable regulations as the proprietors may prescribe for the due accommodation of passengers and for the due arrangement of their own business. The proprietors have not only this right, but the further right to consult and provide for their own interests as a common incident to their right of property. They are not bound to admit passengers on board who refuse to obey the reasonable regulations of the boat, or who are guilty of gross or vulgar habits of

conduct, or who make disturbances on board, or whose characters are doubtful, dissolute, or suspicious; and, *à fortiori*, whose characters are unequivocally bad; nor are they bound to admit passengers on board whose object it is to interfere with the interests or patronage of the proprietors, so as to make the business less lucrative to them. And as passengers are bound to obey the orders and regulations of carriers unless they are oppressive and unreasonable, whoever takes a passage, under ordinary circumstances impliedly contracts to obey such regulations, and may justly be refused a passage if he wilfully resists or violates them.'[63]

Any passenger travelling by railway may be removed from a carriage or the premises of a railway if found suffering from an infectious disease; or who persists in smoking after having been warned to desist; or who is in a state of intoxication; or who commits a nuisance or any act of indecency in any carriage or upon any part of the railway; or who, without lawful excuse, interferes with the comfort of any passenger, or extinguishes any lamp in a railway carriage; or who, being a male passenger, without lawful excuse enters a carriage, compartment, room, or other place reserved for females.[64] And *any* carrier of passengers would be justified at common law in removing a passenger from his conveyance or carriage upon the same grounds and under similar circumstances, although not directly

authorised by statute as carriers by railway and sea are by the Railway and Merchant Shipping Acts.

The right that a carrier has to refuse to receive as a passenger any person who is of notoriously bad livelihood, or to whose character or conduct there is any reasonable objection, does not extend to removing him from the train, ship, carriage, or other conveyance after he has been admitted as a passenger, and his fare for the journey has been received by the carrier, on the ground alone of his being a well-known bad character. Thus, for instance, supposing the plaintiff has been a pickpocket or belonged to a gang of dacoits, it would be no excuse for turning him out of a train, ship, or other conveyance so long as he was not guilty of any impropriety of conduct *during the journey*. It would, however, be a question as to the purpose for which such a person became a passenger, and if there were *bonâ fide* reasons for believing that he did so to pick pockets or to commit any criminal offence on the way, the carrier would undoubtedly in the interests of the other passengers, as well as for his own protection, be justified in expelling him.[65]

A carrier of passengers undertakes by his contract to forward passengers with reasonable speed. If he engages to start and to arrive at the termination of the journey at a stated time he will be responsible for not doing so unless prevented by acts of God, or of the enemies of the Queen, or by inevitable accident, such as

floods, snowstorms, or any other cause beyond human control, except where he has given notice that he will not be answerable for want of punctuality. In case of obstruction he must use all reasonable exertions to remove the obstruction and to clear the road for traffic. He is bound to stop at the usual places and to allow proper intervals for the refreshment of the passengers; he is likewise bound to halt at all roadside stations for which he has booked passengers or that are advertised as halting places, and to allow the passengers a sufficient time to alight; and is liable if a passenger is injured by the starting of the train, coach, or other conveyance prematurely. Notice that a station is reached should be given, and changes of train or other conveyances duly and distinctly announced.[66]

The law imposes upon carriers of passengers in ships and by inland navigation the same general obligations and responsibility with respect to the safety of passengers as it does upon carriers by land; and, except where particular Acts of Parliament, as the Merchant Shipping Act, interfere, they are bound by the same rules, there being no distinction between them.[67] But there is a material difference between the reciprocal rights and duties of carriers by water and of their passengers, as compared with those of carriers by land.

For instance, the diet, space, attendance, accommodation, and other conveniences for passengers in every

ship or steamer are fixed by statute.[68] The master of a ship or steamer has, within the scope of his duty, an unlimited authority over all the passengers, and has power to subject any passenger to restraint or imprisonment, and even to coercion for disobedience to his authority when lawfully exercised; but such restraint, imprisonment, or coercion must not exceed the necessity of the case. And passengers must give their assistance if it becomes necessary and is required by the master in cases of sea perils and attacks by enemies.

Thus, where a passenger brought an action against the master of a ship for an assault and false imprisonment, it appeared that two strange sail were seen, which the master supposed to be enemies, and he mustered all hands on deck, assigned a station to every one, and ordered the plaintiff, together with other passengers, to the poop to fight with small-arms. He was obeyed by all except the plaintiff, who, having been denied access to the poop at a previous time, refused to proceed there, but offered to fight in any other station. The master then ordered him to be forcibly carried to the poop, and kept him there all night in irons. The Court, *per* Lord *Ellenborough*, held that, although the confinement of the plaintiff might have been necessary and justifiable, the defendant had clearly exceeded his authority in keeping him *in irons on the poop all night.*[69]

CHAPTER IV.

OF THE LIABILITIES OF CARRIERS OF PASSENGERS.

Liability for Injuries to Passengers.—Negligence is the gist of every action at law against a carrier for damages on account of personal injuries.

Negligence defined.—There are three degrees of negligence, which may be defined as:—

Gross negligence, *lata culpa*, or, as the Roman jurists call it, *dolo proxima*, is considered by some writers as *almost* equivalent to *dolus* or fraud itself; and consists, according to the best interpreters, in the omission of that care which *even inattentive and thoughtless* men never fail to take of their own property. This fault is justly held to be a violation of good faith.

Ordinary negligence, *levis culpa*, is the want of that diligence which the generality of mankind use in their own concerns; that is, of ordinary care.

Slight negligence, *levissima culpa*, is the omission of that care which *very vigilant and attentive* persons

take of their own goods, or, in other words, of very exact diligence.[70]

Negligence may thus be ordinary, less than ordinary, or more than ordinary. Gross negligence may be deemed to be the want of slight diligence, slight negligence the want of great diligence, and ordinary negligence the want of ordinary diligence. Ordinary negligence has been otherwise defined as a mean between fraud and accident, and gross negligence as inconsistent with good faith. An act is said to have been done negligently when it has been done otherwise than it would have been by a reasonable man guided by considerations such as ordinarily regulate the conduct of human affairs. Negligence may also consist in the omitting to do something which a reasonable man would do.[71]

But, though these three degrees of negligence have been introduced into the common law from the Roman law, and have been adopted by many eminent judges and jurists, it may be doubted whether the definitions can be always applied in practice as a *hard and fixed rule.* It has, in fact, been held that *any* negligence is gross in one who undertakes a duty and fails to perform it.[72]

The doctrine that gross negligence is equivalent to fraud itself cannot be maintained as a general result of the common-law authorities. It may be quite consistent with good faith and honesty of intention; and,

even when it amounts to a breach of good faith, it does not necessarily involve fraud, as, in statutory language, 'nothing is said to be done in good faith which is done without due care and attention;' [73] so that although a want of due care and attention in a carrier might be a breach of faith on his part, it could scarcely be termed fraudulent or dishonest.

When an action is founded upon the negligence of a carrier of passengers or his servants, it is necessary for the carrier to show that there was no want of reasonable diligence or care on his part or that of his servants in insuring the safety of the passengers.

Diligence defined.—There are infinite shades of care or diligence, from the slightest momentary thought or transient glances of attention to the most vigilant anxiety and solicitude, but extremes, in this case, as in most others, are inapplicable in practice. There may be a high degree of diligence, an ordinary degree of diligence, and a slight degree of diligence. Common or ordinary diligence is that which men in general exert in respect to their own concerns. It may be said to be the common prudence which men of business and heads of families usually exhibit in affairs which are interesting to them.

It is obvious that this is adopting a very variable standard, for it still leaves ground for question and doubt as to what is common prudence, and who is capable of governing a family. But the difficulty is

intrinsic in the nature of the subject, which admits of an approximation only to certainty. Like its opposite, 'Negligence,' what is common or ordinary diligence is more a question of fact than of law. And in every community it must be judged by the actual state of society, the habits of business, the general usages of life, and the dangers as well as the institutions peculiar to the age. So that although it may not be possible to lay down any very exact rule applicable to all times and all circumstances, yet that may be said to be common or ordinary diligence in the sense of the law which men of common prudence and average intelligence generally exercise about their own affairs in the age and country in which they live, as it may happen that the same acts which in one age or one country may be deemed negligent may at another time and in another country be justly termed an exercise of ordinary diligence.[74]

Actions against Carriers of Passengers.—An action will lie against a carrier of passengers for damages on account of the death of or personal injury to any passenger, if such death or injury was caused by any wrongful act, negligence, or default on his part or on the part of his servants.

Under Section 1, Act xiii. of 1855 of India, whenever the death of any person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have

entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action or suit for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony or other crime. Every such action must be for the benefit of the *wife*, *husband*, *parent*, or *child*, if any, of the person whose death shall have been so caused, and must be brought by and in the name of the Executor, Administrator, or Representative of the person deceased. And further, that, in addition to such damages, the plaintiff may insert a claim in his plaint for and recover any pecuniary loss to the estate of the deceased occasioned by such wrongful act, neglect, or default.[75]

An attempt has been made, though it was unsuccessful, to extend quite unduly the operation of Lord Campbell's Act (9 and 10 Vict. c. 93), of which the above-quoted Indian statute is a duplicate, by putting upon its provisions a construction of this kind. It was said that the statute gives to the personal representatives of the deceased, whose death has been caused by negligence, a right of action beyond that which the deceased himself would have had if he had survived, and based upon a different principle. It was contended that if bodily hurt were sustained by a person, and damages were recovered in respect of it by him, and his

death afterwards resulted from that hurt, another action at the suit of the personal representatives would lie to recover damages in respect of the injury and death. Similarly, it was urged that if the claim of the deceased for the hurt sustained by him were compensated by a payment of money made to and accepted by him living, such payment, or accord and satisfaction would not operate in bar of an action by his personal representatives founded upon the above-mentioned Act, to enforce additional compensation. The words of the English statute, which, like the Indian Act, enacts that not more than one action shall be brought in respect of the same subject-matter of complaint, were, however, not to be so strained, and by the judgment in the case in which the question was raised, all such contentions have, we may suppose, been set at rest.

The point thus adjudged was one of much practical importance. It being customary for carriers by railway liable to be brought within the reach of Lord Campbell's Act to arrange, with persons who have sustained bodily hurt through the negligence of their servants, the amounts of compensation to be paid them, it would be hard indeed if, on the death of any one of the injured persons so compensated, in consequence of his injuries, another action founded upon the same transaction should be brought to a successful issue, against the carrier.[76]

In every action on account of personal injury, fatal

or otherwise, brought against a carrier, the plaint must set forth that the injury in respect to which damages are claimed was caused by the negligence, unskilfulness, wrongful act, or other default of the carrier or his servants.

In reply to a suit of this kind the carrier may put forward any of the following pleas:—(1) A general plea of not guilty of the alleged negligence, unskilfulness, wrongful act, or default complained of; or (2) that the plaintiff by his own negligence or misconduct contributed to cause the injury sustained; or (3) that the injury was the result of the wrongful act of a third party; or (4) that the plaintiff was a trespasser at the time he received the injury, or that he had been guilty of wrong, fraud, or misconduct towards the defendant, such as to disentitle him to redress; or (5) that the accident in which the plaintiff sustained the injury was occasioned by the act of God, or of the enemies of the Queen; or (6) that it was inevitable and beyond defendant's control.

Not Guilty.—With regard to the first plea of general denial of negligence or 'not guilty,' where an accident happens without default or negligence on the part of the carrier, or blame imputable to him, he will not be responsible; the onus, however, of establishing this defence will be cast upon the defendant, where the facts are such as raise a *primâ facie* case against him.[77] It has been ruled by the High Court of Calcutta that,

where the facts are *equally* consistent with the presence or absence of negligence, the plaintiff cannot recover; and the defendant is not bound to show that there was no negligence.[78] A *primâ facie* case must be raised against a carrier in order to throw the onus upon him of proving that there was no negligence on his part or that of his servants.[79]

Contributory Negligence.—Where a plaintiff could by the exercise of ordinary care have avoided the consequences of the defendant's negligence, he is said to be guilty of 'contributory negligence,' and has no legal remedy. The rule of law is that, although there may have been negligence on the part of the plaintiff, yet, unless he might by the exercise of ordinary care have avoided the consequences of defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong, and will be held in law, upon the principle *volenti non fit injuria*, to have disentitled himself to complain.

The question whether or not the complainant contributed to the accident that happened to him, by want of ordinary caution, is necessarily one of degree, to be answered by reference to the facts adduced in evidence. If the plaintiff voluntarily incurred danger so great that no sensible man exercising ordinary care would have incurred it, he will sue in vain for compensation.[80]

Where the plaintiff got into a railway carriage which was full, and remained standing with his hand on the

door for about half a minute, when the guard called out to the passengers to take their seats, slammed the door of the carriage, and in doing so crushed the plaintiff's fingers between the door and doorpost, it was held that there was no evidence of negligence on the part of the guard; and secondly, assuming that there was, there was such contributory negligence on the part of the plaintiff as to disentitle him to recover.[81] But a contrary decision was given in another case, in which the plaintiff sued for compensation on account of an injury of a similar nature, where it was proved that the guard slammed the door without any warning and before the passenger had seated himself.[82]

Contributory Negligence of Infant.—Contributory negligence does not, however, disentitle an infant of *tender age* to recover for an injury sustained by the negligence of the carrier; otherwise when such injury is occasioned *entirely* by the negligence of the infant.[83]

The parent of a child of very tender years may, however, by contributory negligence, disentitle the child hurt through the defendant's default from obtaining redress in damages—the child being so far identified with the parent that an action brought in the child's name would not be maintainable. A passenger by an omnibus is so far identified with the driver that the negligence of the latter contributing to a collision with another conveyance may disentitle the passenger to redress as against its owner. This same principle has

been applied so as to identify under analogous circumstances a passenger by a railway train with the engine-driver. At all events the question has been judicially suggested as worthy of consideration, whether in a case of railway collision, with evidence of contributory negligence, a passenger sustaining bodily hurt therefrom could maintain an action for breach of contract against the company which carried him, and another action for negligence against the company whose servants caused the accident.

Contributory Negligence of Parent.—In the case referred to above, the plaintiff, a child of five years of age, was under the care of his grandmother, who purchased a ticket for herself, and another for him, from A. to B. on defendants' line of railway, and while crossing the line at A. to be ready for their train they were both knocked down and injured by another train. The accident was partly due to the defendants' negligence, but there was also such negligence on the part of the grandmother as would have prevented her from recovering from the defendants in respect to her own injury :—*Held*, that there was a complete identification of the plaintiff with the grandmother, and that, by reason of her negligence, the action in his name could not be maintained. This decision was affirmed on appeal.[84]

Contributory Negligence of Driver.—A passenger in a public conveyance of any kind injured by the negligent management of another conveyance cannot maintain an

action against the owner of the latter, if the driver of the former, by the exercise of proper care and skill, might have avoided the accident which caused the injury. The passenger's remedy would be against the carrier in whose conveyance he was travelling at the time.[85] It would be no defence for the carrier to allege that his driver kept the proper side of the road, and that the driver of the other conveyance was on the wrong side of the road, if there was sufficient room for his conveyance to pass the other without inconvenience.[86] But if two conveyances meet on a sudden, the party on the wrong side would be liable for an injury, unless he could show that the party on the proper side had ample space and opportunity to avoid a collision.[87]

Wrongful Acts of third Person.—A carrier of passengers is not responsible for the consequences of the wrongful act of a third person unless, by the exercise of ordinary diligence, he could have prevented them. Thus when an accident is caused by an obstruction placed on a railway by a stranger, or by cattle trespassing on the line through the owner's default, the carrier is not liable, except where his negligence in not providing proper fencing, gates, &c., may have contributed to the accident. So also if an accident happen to a passenger through the negligence of a fellow-passenger.[88]

Assuming it is *primâ facie* evidence of negligence in a railway administration that a train has got off the line, such evidence is entirely rebutted by proof that

the accident arose from the wilful and wrongful act of a stranger.[89] If a dâk-carriage occupied by passengers, while being driven with reasonable care and skill on the proper side of the road, be run into by an omnibus coming in an opposite direction and the passenger injured, the owner of the former conveyance would not be liable unless his servant, the driver, could have avoided the accident.[90]

Trespasser.—If the person travelling be a trespasser, or has been guilty of some wrong or illegal conduct with reference to the carrier, as by entering a railway carriage without a ticket, or by riding or intruding in or upon any vehicle or part of a vehicle not appropriated to the carriage of passengers, without the license or permission of the carrier, he would not be entitled to recover for an injury caused by the negligence of the carrier's servants.[91]

It has been ruled by the High Court of Bombay that a person is a trespasser, *ab initio*, who travels in a railway carriage without having first paid his fare and obtained a ticket, although he may have been actuated by no fraudulent intention in so doing.

The evidence in this case showed that the plaintiff entered a carriage on the defendants' railway at Surat with the purpose of proceeding to Bombay, and by an oversight, without any fraudulent intent, he omitted to procure a ticket at Surat. On arriving at Nowsari, he applied to the station-master for a ticket to Bombay,

but was refused; he was, however, allowed by the defendants' servants to proceed in the same train to Balsar, where he again applied for a ticket and was again refused, but was directed by the defendants' servant to get into the train, and not to leave it again. At Dhandu he again got out and applied for a ticket. During a discussion between the plaintiff's master and the station-master, the plaintiff at the direction of his master re-entered the train. Ultimately the station-master refused to issue a ticket, and ordered the plaintiff to get out of the train, and, on his not complying with the order, sent a sepoy, who forcibly removed the plaintiff from the carriage. In an action for damages on account of the illegal removal and detention of the plaintiff it was held by the Court— (1) That the latter portion of Section 2 of Act xxv. of 1871, amending the section of Act xviii. of 1854, which provides for payments to be made by persons failing to produce their tickets, applies only to the case of a person who has received a ticket and cannot or will not produce it, and not to a person travelling without having obtained a ticket; and (2) that the absence of a fraudulent intention did not make the entry into the carriage less unlawful, and that consequently the plaintiff started from Surat as a trespasser; and (3) that the conduct of the railway officials at the stations between Surat and Dhandu, if it amounted at all to leave and license to the plaintiff to proceed

without a ticket, could only operate as such until the train stopped at the next station; and (4) that there was no legal obligation on the station-master to issue a ticket to the plaintiff to enable him to proceed from Dhandu.[92]

In a case where the plaintiff employed the defendant to remove her goods in a cart, and with the consent of the defendant's carman rode upon the cart, which broke down, it was held that she was not entitled to recover for the personal injury to herself, for there was no contract to carry the plaintiff safely, but only her goods, and by getting into the cart she became a trespasser.[93]

But, in another case, in which the mother of the plaintiff, the latter a child about three or four years of age, took a ticket for herself, but in contravention of the Railway Act paid nothing for her child, who travelled with her, and under her care: the child, being injured in the course of the journey through the negligence of the company's servants, brought his action. The jury having *negatived fraudulent representation* by the mother as to the child's age, found that the company contracted to carry both the mother and child. The Court in delivering judgment, per *Cockburn*, C.J., *Shee*, *Lush*, and *Blackburn*, J.J.:—*Held*, that inasmuch as the company contracted to carry both the mother and child, they were liable to the latter for negligence, and further, that, independent of any

contract between the mother and the company, a duty under the circumstances was cast upon the latter to use proper and reasonable care in carrying the child.[94] Had, however, fraudulent representation been proved against the mother, a contrary decision would doubtless have been given.

A traveller upon a railway disobeying a bye-law of the railway administration by getting into a train while in motion, although he do so under the direction of an officer of such railway, cannot recover for any injury received by him while so doing, for he has wilfully broken the law; and he is liable to an action for any damage he may have caused to the property of the railway administration in the commission of his illegal act.[95]

An officer of the Post Office required by the Post-Master General to be conveyed on a railway,[96] a newspaper reporter travelling under a free pass,[97] a person travelling as a passenger at the invitation of a superior officer of a railway,[98] or any other person being carried *with the permission and license* of the carrier cannot be considered a trespasser, nor as being in the carriage or other conveyance unlawfully, and is therefore entitled to all the privileges of other passengers, and may in the absence of any special contract exempting the carrier from liability maintain an action for compensation on account of injury received by him through the carrier's negligence, although he may not have paid

any fare, the carrier being charged by law with such passenger's safety as a duty irrespective of any consideration or contract. The right which a passenger has to be carried safely does not depend upon his having made a contract, but the fact of his being a passenger with the carrier's authority casts a duty on the latter to carry him safely.[99]

Acts of God and of the Queen's Enemies.—A carrier of passengers is exonerated from liability on account of all accidents arising from what may fairly be termed acts of God or of the enemies of the Queen. Thus when an accident takes place owing to a cyclone, typhoon, hurricane, snow-storm, inundation, flood, fog, or any other cause beyond human control, the carrier is exempt from responsibility. In like manner he is not liable for any injuries which his passengers may sustain from attacks made upon them *in transitu* by enemies of the Queen. *For definition of acts of God and enemies of the Queen, see Common Carrier, post, p.* 227.

Inevitable Accident.—A carrier may also excuse himself from liability by proving that the accident in which the injuries were received was inevitable and beyond his control. He is only charged with the safety of passengers so far as human care and forethought will go; and when everything has been done that human prudence can suggest for the security of the passengers, and an accident happens, he will not be responsible for the consequences. Thus, if the lights or signals on a

dark night be obscured by fog, the horses frightened, or the coachman be deceived by a sudden alteration of objects near the road by which he had formerly been guided; or if, having exercised proper skill and care, he accidentally get off the road; or if an injury happen to a passenger from some unforeseen accident or misfortune, and not in consequence of negligence, the carrier will not be answerable.[100]

In a suit against a railway company for negligence in keeping and maintaining their line in an insecure state, the evidence for the plaintiff showed that the railway embankment ran through a country subject to floods, and had five years before been constructed of sandy soil, with insufficient culverts to carry off the water; that an extraordinary fall of rain had caused a flood which had washed away the soil, or part of the embankment, leaving the sleepers unsupported, so that the earth gave way, and the train, an express train, passing over it at night at the ordinary express speed, went off the line. There was no evidence that the water was seen on the line, or that there had been anything to indicate danger, and no engineer or other expert had been called as a witness to prove that the nature of the soil of the embankment was such that it would not resist ordinary floods:—*Held*, that although the evidence of the construction and condition of the line at the time of the accident, and of the rate of speed at which the train had been going, had been properly

admitted, as these were circumstances which might have shown negligence, if it had been proved that the line was known, or ought to have been known, to be in an insecure state; yet, as there was nothing to show that it was so known, there was no evidence of negligence, and there must be a verdict for the defendants.[101]

An accident due to a latent defect in any part of a vehicle, such as a flaw in a wheel or an axle, which could neither be detected in process of construction nor afterwards discovered by skilful and careful examination, has been held, as we have seen, to be an inevitable accident.[102] But, *contra*, where from an imperfect weld in the formation of a wheel of a carriage on the defendants' railway, the wheel gave way and caused serious injury to the plaintiff; and it was proved that when that wheel was new, and before using it, it had been properly and regularly tested by hammering it all round and all over, and although this was a test not absolutely fixed and certain to discover a defect, yet it was the best known and usual course pursued; but that after this the wheel was much used and had been re-turned without being again submitted to a similar test, the Court of Exchequer found that the defendants were guilty of negligence in not having again tested the wheel after it had been worn and re-turned, and gave a decision in favour of the plaintiff.[103]

In an action to recover compensation in damages for personal injuries sustained in a railway accident near

Hatfield in 1878, the evidence showed that in consequence of an axle of a loaded coal truck on a goods train breaking, the train separated in two parts, and one of the trucks of the after-part fouled the down line. The Scotch express which left King's Cross at 8.30 P.M. arrived almost immediately afterwards, and, coming in collision with the truck, the engine was thrown off the rails and fouled the up main line. At the same time an up passenger train from Peterborough came along and ran into the engine of the Scotch express. The plaintiff, who was a passenger in the express, was severely injured and shaken. The amount of damages having been agreed upon between the parties, the only question was the liability of the defendants. *It was admitted that for the latent defect in the axle, which caused it to break, the defendants could not be held liable*; but it was said that if, after the first accident, the defendants' servants had acted properly the accident to the express would have been avoided. First it was contended that the driver of the goods train, on discovering that the train had parted in two, should have gone at once to the signal station, which was close by, and given warning of the accident, or whistled, or made some signal to the driver of the express; and secondly, that the guard of the goods train, the moment he found the down line was fouled, should have run back 500 yards to meet the express, which he knew was due, and exhibited, as he went along, a red light. If either of

these precautions had been taken, it was argued that the express would have been stopped before it reached the point of danger.

For the defence it was contended that every reasonable precaution under the circumstances was taken by the servants of the railway company after the axle broke to prevent any further catastrophe. It appeared that the driver of the goods train went back to look after his lost trucks, and, as he was not aware that the down line was fouled, it was said that in doing so he had not failed in his duty. On the other hand, what the guard did was this:—On seeing the truck on the down line he went quickly back to warn the express, having with him a hand-signal lamp which could show a red, green, and white light. He waved the lamp with a red light, but in order to see his way he sometimes turned on a white light. As he went along he placed on the line two fog-signals, and was about to place a third when the express, travelling at the rate of fifty-five miles an hour, came in sight. As soon as the guard's danger signal was seen the driver of the express put on the vacuum break, with which the train was fitted throughout, and the speed was slackened to about a half when the collision occurred, otherwise the consequences would have been far more serious:—*Held*, that there was no negligence on the part of the railway servants, and that judgment should be given for the defendants.[104]

Injury to Servants owing to Negligence of Fellow-

servants.—In addition to the foregoing special grounds of exemption from liability, a carrier is excused from responsibility for injuries received by one of his servants owing to the negligence or default of a fellow-servant. Where several servants possessed of competent or reasonable skill and ordinary care are employed by the same master, and injury results to one of them from the negligence of another fellow-servant, the master is not in general responsible.*

Take the case of a carrier by railway employing A. and B., two of his servants, as driver and guard of a train. It is admitted that, if by the unskilfulness of A. a stranger is injured, the master is responsible. Not so if A. by his unskilfulness or want of care hurts himself; he cannot treat that as a want of skill and care on the part of his master. Suppose, then, that by the unskilfulness of A. the other servant B. is injured, while they are both engaged in the same work or service, there it appears that B. has no claim against the master. They have both engaged in a common service the duties of which impose a certain risk upon each of them; and in case of negligence on the part of the other, the party injured knows that the negligence is that of his fellow-servant and not of his master. He knew when he engaged in the service that he was exposed to the risk of injury, not only from his own want of skill or care,

* A Bill is now before Parliament to amend the existing law relating to the liability of a master for injuries received by his servant. August 1880.

but also from the want of it on the part of his fellow-servant; and he must be supposed to have contracted on the terms that, as between himself and his master, he would run the risk.[105]

According to a recent decision in the House of Lords, it is not necessary in order to exempt the master from liability that the two servants should at the time of the accident in which one is injured be engaged in the same occupation or work. Lord *Cairns*, Chancellor, in delivering judgment said:—The liability or non-liability of a master to his workmen cannot depend upon the question whether the author of the accident is or is not in a technical sense the fellow-workman or collaborateur of the sufferer. The case of the fellow-servant is an example of the rule, not the rule itself; the rule stands upon broader grounds. The master is not and cannot be liable to his servant unless there be negligence on the part of the master, in that in which he, the master, has contracted or undertaken with his servant to do.[106]

But although a master is not as a rule responsible to one servant for an injury occasioned to him by the negligence of a fellow-servant, yet this rule must be received with the qualification that the master shall have taken due care not to expose his servant to unreasonable risks by associating him only with persons of ordinary skill and care. The servant has a right to expect that he shall only be exposed to the ordinary

risks of the employment, and that the machinery or apparatus about which he is to be employed, and out of which danger arises, shall be attended to with reasonable care, to insure its being in a fit state to be worked without undue or extraordinary danger to those employed on or about it; and although in general an employer is not liable unless he knew of the danger, yet it is his business to know if, by reasonable care and precaution, he can ascertain if the apparatus or machinery is in a fit state or not.

It is not enough therefore that the master did not know of the danger if by reasonable care he might have known, and ought to have taken the proper means of knowing. It follows that although he would not be liable merely on account of the negligence of his servants, yet it is his duty either himself to take the proper means of knowing of the danger, or to employ some competent person to do so. There are many things a man could not personally know of. Thus in the case of a carrier by railway employing machinery which might be attended with danger to the persons employed about it, a danger which might be greatly aggravated by the machinery not being in a proper condition, as for instance in the case of the boiler of a steam-engine bursting, as it would be more likely to do if in an improper condition, the carrier might have no means of personally knowing its condition, and all that could reasonably be expected of him would be that he should

employ some competent person from time to time to examine it. The master must either ascertain the state of the machinery himself or employ some competent person to do so. And if he does employ such a person, and a workman is injured in consequence of that person's neglect of his duty in that respect, the master would not be liable to one of his servants for such negligence of a fellow-servant.[107]

To enable a master to claim immunity in such cases, however, it must be shown that the injured servant was at the time acting in the service of the master; otherwise the servant is substantially a stranger, and entitled to all the privileges he would have had if he had not been a servant.[108]

A railway administration is not liable for injury to the guard of a train occasioned by the negligence of a platelayer in not keeping the permanent way in proper repair and condition; the two servants being engaged in one common object, viz. the safe conveyance of the passengers.[109]

Where a railway administration has running powers over the line of another administration, it is a question whether it is not the duty of the former to see that its engines and carriages are reasonably adapted for safe travelling thereon; but it is clearly the duty of the latter to keep the line in order and free from obstruction. In an action brought by the guard of a railway company, having running powers over a foreign

railway, for an injury sustained by him through his head coming in contact with a post on the servient railway while looking out in the reasonable performance of his duty, it was held that the position of the post was such as to be dangerous to a guard who has to keep a careful look-out for the safety of the train, and that the servient railway company were liable.[110]

But where a servant is employed at a station which is maintained jointly by two railway companies, as Jubbulpore, where the Jubbulpore line ends and the Great Indian Peninsular Railway commences, and is a member of the joint staff, he is a servant of both companies, although he may be nominally only the servant of one, and has no remedy against either for any injury he may sustain through the negligence of a servant of the other company.

Thus, where a servant engaged and paid by one company, but whose services were common to both, was, while performing his duty as a signalman, knocked down and killed by an engine belonging to the company whose servant he was nominally not, through the negligence of the driver, it was held that his widow could not recover, on the ground that the duties of the deceased, and the very acts he was engaged on at the time of his death, were not performed by him as a servant of or for the benefit of one company only, but were essentially necessary for the common business of both, viz. the interchange of traffic between the two

lines, and the case therefore fell within and was governed by the principle that where there is a common employment or common service, the master is not liable.[111]

Master's Liability for Negligence of Servants.—A carrier is responsible for the negligence or default of any one of his servants while such servant is acting within the scope of his duty in his master's business, but not otherwise. It is a rule of law that every man is answerable for acts done by the negligence of his servants, because such servants represent the master himself. For the acts of a man's own servants the law makes him responsible when those acts are negligent or improper. This rule applies to all cases where any vehicles, machinery, or cattle of a master are placed under the care of a servant, a rational agent.[112] Upon the principle that *qui facit per alium facit per se*, that person is undoubtedly liable for any accident resulting from negligent use of such machinery who stood in the relation of master to the wrong-doer—he who had selected him as his servant from knowledge of or belief in his skill and care; and whether such servant has been appointed by the master directly or through the intervention of an agent can make no difference if the servant so selected be paid out of the funds of, or his salary be charged to the owner of, the property.[113]

The master must stand in the position of employer of the servant either directly or indirectly to be made liable for the latter's negligence. When work is done

for a railway administration under a contract, parol or otherwise, the administration is not responsible for injury resulting to a third person from the negligence of one of the contractor's servants or workmen while employed on the works of the railway, although the administration may have reserved power under the contract to remove any of such workmen or servants for incompetence, and may employ its own officers to superintend the work and to direct what shall be done.[114]

The liability of a master for the acts or omissions of his servant is however limited to such acts or omissions as are committed by the servant whilst on his master's business. Where one man employs another to do an act which may be done in a lawful manner, and the latter in doing it commits a criminal or tortious act, whereby injury results to a third person, the employer will not be responsible, unless, as has been ruled by the High Courts of India, he expressly authorised or afterwards ratified the wrongful act of his servant.[115]

A quarrel having arisen on the premises of a railway company, between a servant of the company and a number of persons, the servant gave one of these persons into custody on a charge of assaulting him and obstructing him in the discharge of his duties. In an action brought by such person against the company for assault and false imprisonment, the company were held not responsible for the act of their servant, who was not

acting in the exercise and within the scope of his duty at the time.[116]

But in another case, where the plaintiff, while standing on a railway platform waiting for her train, was struck and injured by a long bag containing personal luggage which a porter was negligently swinging round, it was ruled that the company were liable.[117]

The act of a local representative of a carrier will bind the latter. Thus, the plaintiff was a passenger by the defendants' railway with a return ticket from M. to N. On reaching E., a station *short of* N., he got out, but was informed that he must pay 2*d*. excess fare. This he refused to do. He was thereupon given into custody by the inspector of the defendants' station upon the charge of refusing to deliver up his ticket or pay his fare, and thereby defrauding the defendants. This charge was dismissed by the magistrate. The plaintiff having brought an action for trespass and false imprisonment:—*Held*, that as the station inspector was the defendants' representative at E., it must be presumed, in the absence of evidence to the contrary, that he had authority from the defendants to arrest persons supposed to be guilty of committing offences against the Railway Act, and that the defendants were liable for his mistake.[118]

A foreman porter in the service of a railway company who, in the absence of the station-master, is temporarily in charge of the station, has no implied

authority to give in charge a person whom he suspects to be stealing the company's property; and if he gives an innocent person in charge on such suspicion, the company are not liable.[119]

Actions for Damages in case of Death of injured Person.—All actions instituted under Act xiii. of 1855 (Lord Campbell's Act in England) against a carrier of passengers for damages on account of the death of any person from injuries received in consequence of the negligence or wrongful act of the carrier or his servants, must be for the benefit of the *wife*, *husband*, *parent*, or *child* of the deceased. The word 'parent' includes father and mother, and grandfather and grandmother, and stepfather and stepmother; and the word 'child' includes son and daughter, and grandson and granddaughter, and stepson and stepdaughter. Not more than one action can be brought in respect to the same subject-matter of complaint, and the right of action is barred if the deceased previous to his death accepted any compensation from the carrier on account of the injury, notwithstanding that at the time he may not have anticipated a fatal result. *See ante, p.* 62.

An action can only be maintained in cases where the deceased could have maintained the action if alive; therefore, if in an action, where the death is alleged to have been caused by the negligence of the defendants' servants, it be shown that the deceased by his own negligence or carelessness contributed to the accident,

or that he had been a trespasser, or guilty of some wrongful or illegal act with reference to the carrier such as would have debarred him from redress had he been living, the defendant would be entitled to a decree. The rule as to this in actions instituted by the representatives of a deceased person is the same as if the injured person had himself brought the suit.

There must also be evidence of some actual pecuniary damage having been sustained by the plaintiff in consequence of the death of the person injured. In an action brought by a father for injury resulting from the death of a son, it appeared that the father was a working mason, and that the son was a boy of fourteen years of age who had earned four shillings a week for a year or two, but at the time of his death was out of employment. There was no evidence of the cost of clothing and feeding the boy. The jury found that the father had sustained a pecuniary loss by the death of the son, and gave a verdict for 20*l.*[120]

In all actions of this kind the damages should be calculated in reference to a reasonable expectation of pecuniary benefit from the continuance of the life. Where a father instituted a suit against the South Eastern Railway Company for injury resulting from the death of his son, it was proved that the father was old and infirm; and that the son, who was young and earning good wages, assisted his father in some work for which the father was paid 3*s.* 6*d.* per week. The

Court found that the father had a reasonable expectation of benefit from the continuance of the son's life, and held that the action was maintainable.[121]

It is a *primâ facie* Case of Negligence in a carrier by railway that at the time an accident not consistent with good care occurred, the train and railway were exclusively in his management. But the case may be rebutted by showing that the accident was occasioned by the wilful act of a stranger.[122] Thus, where an accident happens to a passenger in a carriage on the line of railway, either by the carriage breaking down or running off the rails, that is *primâ facie* evidence of negligence on the part of the railway administration concerned. Such evidence, if not rebutted by that offered for the defence, is sufficient to justify a decree for the plaintiff.[123] But the fact of the occurrence of an injury not necessarily importing negligence, even if it be *primâ facie* evidence, is not conclusive proof of negligence, and it has been ruled by the High Court of Calcutta that where the facts of the case are equally consistent with the presence or absence of negligence, it is not incumbent upon the defendant to show that there was no negligence, and he is entitled to a decree. *See ante, p.* 65.

In an action brought in the Court of Queen's Bench against the London and Brighton Railway Company, Lord *Denman*, C.J., told the jury that they must be satisfied that the accident had been brought about by

the negligence of the defendants in the course of carrying the plaintiff upon their railway; and that it having been shown that the exclusive management both of the railway and of the machinery was in the hands of the defendants, it was presumable that the accident arose from their want of care unless they gave some explanation of the cause by which it was produced, which explanation the plaintiff, not having the means of knowledge, could not reasonably be expected to give. His lordship adverted to the evidence given for the plaintiff that the rails had been somewhat deranged at the spot where the accident took place, and a witness expressed his opinion that the train must have been proceeding at a speed which, considering the state of the road, was hazardous. The Court gave judgment against the railway company.[124]

A plaintiff claiming compensation from a carrier by railway for a personal hurt sustained by him whilst being conveyed on his line of railway, must give such evidence that the Court may reasonably find that there had been 'negligence' on the part of the defendant, and no '*contributory negligence*' on the part of the plaintiff. Proof of negligence in this class of cases may consist in what was said by the railway officials when the accident occurred, or in their conduct, or in that of the complainant.

Is the announcement of the name of a station, and the stoppage of the train thereat, to be taken as an

invitation to passengers to alight? If the train goes beyond the platform, so that it might be dangerous to alight from it, was sufficient notice of the danger, and that the train would back, given by the servants of the company? Was the plaintiff in fault in attempting to get out when the train had passed the platform? [125] These questions may form a point upon which a decree for the plaintiff or the defendant may depend.

Invitation to Alight.—The announcement of the name of a station, coincident with the stoppage of the train thereat, and its coming to a complete standstill, is, in the absence of a warning to the passengers to keep their seats, an invitation to alight, at all events after such a time has elapsed that a passenger may reasonably infer that it is intended he should get out if he proposes to alight at that particular station.

The mere stopping of a train and calling out the name of the station is not, in all cases, evidence of an invitation to alight. The plaintiff was a passenger by the defendants' railway to Bromley station. As the train arrived there she heard 'Bromley, Bromley' called out several times. The train was brought to a standstill, but not before it had partly overshot the platform. As the plaintiff was in the act of getting out, and when her foot was on the step of the carriage, the train was put back with a jerk, and she fell on the platform. The period occupied by the stoppage of the train was little more than momentary, and the plaintiff knew

the station well:—*Held*, that there was no evidence of negligence on the part of the defendants.[126]

In the case of *Howe* v. *The South Eastern Railway Company*, just decided by the Court of Exchequer, the plaintiff, a passenger by the defendants' railway to Cannon Street station, alleged that on arriving at the station she waited a short time, then, seeing other people getting out, she attempted to do the same. While doing so, a sudden jerk, attributed to an engine being attached to the rear of the train to draw it out from the platform, threw her forward with some violence on to the platform, injuring her knee. Subsequently internal injuries developed themselves, and she had been an invalid ever since. The case for the defence, which was supported by evidence, was that the plaintiff recklessly jumped out of the carriage while the train was moving, that there had been no invitation for her to alight, but on the contrary a distinct warning had been given to the passengers to keep their seats. The Court found that the plaintiff had failed to make out a case of negligence on the part of the Company, as she was bound to do to enable her to recover, and decreed judgment for the defendants.[127]

An invitation to alight on the stopping of a train without any warning of danger to a passenger, who is so circumstanced as not to be able to alight without danger, such danger not being visible or apparent, amounts to negligence on the part of the railway

administration. The plaintiff was a passenger by the defendants' line, and as the train reached the station he heard the name of such station called out, the train afterwards stopped, and he heard the opening and shutting of doors usual upon passengers alighting. He then opened the door of his carriage, and got out upon what he expected to be the platform, but the part of the train in which he was carried having overshot the platform, he fell on to the embankment. It was a dark night at the time, and plaintiff was unable to see whether there was a platform or not. No warning was given to the passengers to keep their seats, and the train was never backed, but after the accident proceeded on its journey:—*Held*, that there was negligence on the part of the company's servants, and that no contributory negligence had been shown by the plaintiff.[128]

Sufficient Time for Passengers to alight must always be allowed. Plaintiff went to station A. on the defendants' line of railway with the intention of taking a ticket thence to another station B. on the same line, but the crowd was so great that she could not get to the booking-office. She therefore, with the guard's permission, got into the break-van with other passengers, similarly circumstanced, having previously told the guard that she wished to alight at B. station. The train stopped at the latter station only a few minutes, and the van in which the plaintiff rode was, owing to the length of the train, beyond the platform. While shs

was alighting the train started, and she sustained serious injuries by being thrown to the ground in consequence :—*Held*, that there was evidence of negligence on the part of the company's servants.[129]

In another action, it appeared that the plaintiff was travelling on a tramcar belonging to the defendants, and when she wished to get out the conductor rang a bell and stopped the car, but started it again before she had got off the step. The plaintiff was thrown down and fell upon a basket she was carrying, injuring herself, and the injuries resulted in an aneurism :—*Held*, that there was evidence of negligence on the part of the conductor, and judgment was given for the plaintiff.[130]

Reasonable Means of alighting from Vehicles must also be provided by the carrier, and he is responsible for any neglect of this duty. Thus, where on the arrival of a train at the railway terminus, there not being sufficient room for all the carriages to be drawn up to the platform, some of the passengers were required to alight upon the line beyond it, the depth of the carriage to the ground being about three feet: in so alighting, a lady passenger, instead of availing herself of the two steps attached to the carriage, with the assistance of a gentleman jumped from the first step of the carriage to the ground, and sustained a spinal injury in consequence :—*Held*, that the railway company were guilty of negligence in not providing

reasonable means of alighting, and that the passenger had not by any misconduct on her part contributed to the injury.[131]

Defective Platforms.—A mere expression of opinion that any part of a railway station or works is dangerous is not evidence of negligence. A railway company had a platform extending from their station to their steamboat pier, on the river H., which was 4′ 3″ in width. On one side the platform was protected by railings, but on the side next the railway, which ran parallel with it for some distance, there was a guard of wood 9″ in height. In an action against the company, two witnesses stated that they considered it a dangerous platform; but this was held to be merely an expression of opinion, and not evidence of negligence.[132]

In a recent case it appeared that the plaintiff took a return ticket from New Richmond to Hammersmith and back, at the New Richmond station, which belongs to the London and South-Western Railway Company. He travelled to Hammersmith, and thence to London. The defendants, the Metropolitan District Railway Company, had statutory running powers over the London and South-Western Company's line from Hammersmith to New Richmond. The plaintiff on the same day returned from London to Hammersmith, and then, availing himself of his return ticket, travelled to New Richmond station in a train which belonged to the defendants, and was under the management of their servants. The

carriages of which this train was composed were adapted to the stations on the Metropolitan District Railway, where the platform is only a few inches lower than the floor of the carriages, but the platform at the New Richmond station was 2′3″ lower than the floor of the carriage in which the plaintiff was travelling. The plaintiff arrived at New Richmond station at 9.30 P.M., and in alighting he put his foot down, expecting to find a footboard, but there being no footboard broad enough for him to step on, he slipped and fell, and was seriously injured.

Cockburn, C.J., before whom the case was tried, asked the jury, first, whether there was negligence in the construction of the platform, relatively to the construction of the carriage, leading to the accident; and, secondly, whether there was contributory negligence on the part of the plaintiff. The jury found for the plaintiff. A rule to set aside the verdict and to enter a verdict and judgment for the defendants, on the ground that on the facts proved the defendants were not liable, as the platform was not their property, was discharged by *Grove* and *Lopes*, J.J., and the defendants appealed.

The appeal was argued by the Solicitor General (Sir H. S. Giffard) before *Bramwell*, *Baggallay*, and *Thesiger*, Lords Justices, and the judgment of the lower court affirmed, the court ruling that as the carriages, the motive power, and the servants driving and conducting the same were the defendants', they

were the carriers, and were bound to provide reasonably safe means of alighting.[133]

Train overshooting Platform.—Although the fact of a train or some of the foremost carriages attached to it having overshot the platform is *primâ facie* proof of negligence or want of skill on the part of the railway servants, it does not relieve the passengers in such carriages from the obligation of taking reasonable and ordinary care for their own safety by satisfying themselves that there is a platform or other safe place for them to stand upon before they alight from the carriages, and to maintain an action in such cases it is incumbent upon the plaintiff to prove that he did exercise that degree of care, and that there was no contributory negligence on his part.

The following two recent decisions, in which the law was laid down on this point, will serve to illustrate how a passenger may by his own act disentitle himself to relief.

The plaintiffs, Cranfield, *et uxor*, instituted a suit against the London Brighton and South Coast Railway Co., to recover compensation for injuries sustained by Mrs. Cranfield in getting out of a carriage at Forest Hill station. From the evidence it appeared that the carriage in which Mrs. Cranfield was travelling considerably overshot the platform, and after waiting some half a minute after the train had pulled up, Mrs. Cranfield, not knowing in the dark, as there was no

light near, that the train had overshot, proceeded to alight on what she believed to be the platform, but what proved to be some ballast or gravel at the end of the platform. She fell in a sitting position, but was able to get up and go round to the other side, and take the next train back to Sydenham, whence she came, the two stations being consecutive. Afterwards serious internal injuries and distressing symptoms developed themselves. At the trial a porter when called said that he was on duty and had been sent forward by the station-master as the train drew in for the purpose of assisting the passengers to alight, it being obvious that the train would overshoot the platform. In cross-examination he admitted that he was standing at the end of the platform when the train stopped, and that he saw the plaintiff's wife standing at the open door of the compartment about to alight, but that he did not caution her, or assist, or offer to assist her in alighting, although he knew that if she got out then she would step on what was not the platform. He did not call out 'Keep your seats,' nor did he hear the guard do so, although that official swore he had done so. The jury found a verdict for the defendants, but without costs, as they thought the railway officials had shown some degree of negligence in their conduct.

The plaintiff's counsel being dissatisfied with this verdict, the Chief Baron left the following questions to the jury:—(1) Do you consider there was a want

of ordinary care on the part of the railway company which brought about or assisted in bringing about the accident? Answer, Yes. (2) Do you consider the plaintiff might have avoided the accident by the exercise of ordinary care? Answer, Yes. (3) Do you consider the defendants' servants by the exercise of ordinary care might have avoided the accident, notwithstanding the plaintiff's negligence (following *Radley's* case, 1 W. Rep. House of Lords, 754). Answer, Yes. And (4) Do I understand you to find substantially in favour of the defendants? Answer, Yes, we do. Upon which his lordship entered judgment for defendants.[134]

The second case was an action brought against the Great Western Railway Company. The evidence showed that upon a train on the defendants' line of railway arriving at a station, the two or three foremost carriages, in one of which the plaintiff was a passenger, overshot the platform at the station, and where the carriages stopped the line of railway is on an embankment some height above a roadway. The night was rather dark, and there was no light in the carriage, and no stationary light on the platform; nor was there any fence on the top of the embankment between it and the roadway beneath. When the train stopped, the plaintiff, knowing that the carriage had overshot the platform, and without waiting to see whether it would be backed, got out of the carriage in the dark, and in doing so

missed his footing and fell forward over the embankment into the roadway beneath.

The Court held that on the facts stated the railway company were not guilty of negligence, and were not liable for the injuries sustained by the plaintiff. *Bramwell*, B., in delivering judgment, remarked:—'It is said by the plaintiff's counsel that the defendants ought to have fenced off the line beyond the platform from the roadway. No doubt there is a duty on a railway company to fence their line, but this is a duty towards persons who are *off* the line to prevent them from straying or getting upon it. There is no duty on them to fence as towards passengers or persons who are already *on* their line; and where is to be the limit as to the extension of this fencing? How far beyond the platform is the fence to be continued? But there is another answer to the appellant's complaint. He should not have got out, but have sat still until the carriage was drawn up to the platform; and, if he had been taken on against his will, he could have brought an action against the company for so carrying him beyond his destination, and not providing proper means for his getting out of the carriage at the desired station.'[135]

Improper Loading of Luggage.—The improper position or packing of luggage, whereby a passenger is injured, is considered as negligence on the part of the carrier or his servants, for which he is answerable. If at the time of an accident there are more passengers in

or upon the vehicle than are allowed by statute, or if the vehicle is overloaded with luggage, it has been held to be conclusive evidence of negligence. So from the fact of a coach or other vehicle breaking down, negligence will be presumed, and the onus of proof to the contrary will be upon the defendant. But if the breaking down of the coach is purely accidental, the plaintiff has no remedy for the misfortune he has encountered.[136]

Defective Construction of Carriage or Coach.—A carrier of passengers is bound to examine into the efficiency of his means of conveyance previous to each journey; and if he fails to do so, and an injury happens to a passenger in consequence of the insecurity of the carriage or coach, it will be negligence on his part, though the carriage or coach had actually been examined prior to the second journey before the accident, and notwithstanding it had just been repaired. Where an action was brought against the proprietor of a stage-coach for negligence, whereby the plaintiff's wife was injured, it was proved that she was an outside passenger, and there was no railing between her and the luggage on the roof of the coach, and while she was sitting with her back against it, by a sudden jolt she was thrown off and had her leg fractured. At the trial the learned judge directed the jury to find a verdict for the plaintiff, if they were of opinion that the injury was sustained by the negligence of the defendant. The jury found for the plaintiff accordingly, and stated that they

so found on account of the improper construction of the coach, and of the luggage being on the seat, and the Court of Appeal held that the question had been properly submitted to the jury, and that the facts found specially by them amounted to negligence in the defendants.[137]

Defective Arrangements at Stations, &c.—Besides the care which a carrier by railway is bound to take of a passenger while *in transitu*, he ought by proper precautions to prevent, so far as may be, the happening of any accident at a station, either by the undue crowding of the public to the trains, or by persons crossing the line at a dangerous moment or otherwise. The carrier should, therefore, have directions for the guidance of passengers to the trains, or from one part of the station to another, legibly posted up, and the stations should be sufficiently lighted for the safety and protection of strangers. Such an obligation is laid upon every railway administration by virtue of a general principle of law, that a person who invites another to come on his premises must be deemed to have undertaken with regard to that person a duty to take reasonable care that the premises upon which he invites him to come—the approach to the premises as well as the exit therefrom—shall be in such a state as not to expose the person using them in consequence of the invitation to undue or unreasonable danger.[138]

Thus, the plaintiff, a passenger by the defendants'

railway, was set down at a station after dark on the side of the line opposite to the platform and place of egress. The train was detained more than ten minutes at the station, and from its length blocked up the ordinary crossing to the station building. The ticket collector stood near the crossing with a light telling the passengers as they delivered their tickets to pass on. The plaintiff passed down the train to cross behind it, and, from want of light, stumbled over some packages which had just been put out of the train, and was injured. The practice of the passengers had been to pass behind the train when long:—*Held*, that these facts disclosed evidence of negligence on the part of the railway company.[139]

Insufficient Lighting of Station.—Although it is incumbent upon a railway administration to arrange for the stations on its railway being sufficiently lighted for the safety and protection of passengers and strangers, it is under no obligation to light such portions of a station yard as are not set apart for public traffic. Thus, where the plaintiff, being in a railway station, and wishing to cross the line at a part where there was no footpath, and which was unlighted, while doing so fell into a hole and dislocated his shoulder, it was held that the railway company were not bound to light the line at that place where there was no recognised footpath, that they were not therefore guilty of negligence, and that the plaintiff could not recover.[140]

Obstructed Entrance to Platform.—In a suit for damages on account of personal injuries received through the alleged negligence of the defendants' servants, it appeared that the plaintiff was about to proceed by train from the defendants' station at London, and was told by one of the company's servants to go through the booking office, as the train was about to start. The plaintiff, in a hurry to catch the train, ran towards the platform, and as he was in the act of passing through the main line booking-office, he accidentally fell over a luggage truck which was standing almost in the centre of the office, and severely injured his leg and right thumb. He was confined to his room for five weeks, and for some time afterwards he was unable to attend to his business. In cross-examination, he stated that he had lost his right eye from a previous accident, and admitted that he might have seen the truck if he had not looked up at the clock, but he alleged that the booking-office was insufficiently lighted at the time. The defendants proved that the luggage truck was in its usual place and position for use in the conveyance of passengers' luggage from the booking hall to the train, and that the gas was fully on in the hall at the time, and alleged that the plaintiff might have avoided the truck if he had used due care and caution. The evidence was very conflicting, but the jury ultimately returned a verdict for the defendants. [141]

Defective Staircase.—A railway company had at

one of their stations a staircase used to enable passengers to ascend from the platform to the street; the stairs were six feet wide, and were each nosed with a strip of brass two and a half inches wide which had been worn smooth and slippery, and were not provided with any hand-rail. The plaintiff, who for eighteen months had been in the habit of using the stairs almost daily, in ascending them in the daylight, slipped upon the brass nosing and was injured :—*Held*, that there was no evidence of negligence on the part of the defendants.[142]

Defective Over-bridge.—Where a passenger lost his life through the faulty construction of an over-bridge connecting two platforms, it was held that the railway company were liable though there was a safer bridge about one hundred yards further round that deceased might have used.[143]

Defective Points.—The plaintiff took a ticket from A. station to B. from the W. J. Company. In order to arrive at the platform at M., a junction station, the trains pass over the line of the M. & C. Railway. On that line is a self-acting switch used for shunting carriages into a siding. The switch and siding were the property of the M. & C. Company, but used exclusively by the W. J. Company. The switch is about four yards from a gate which is on the line of the W. J. Company, a servant of which company was in the habit of occasionally looking over the gate to see that the switch was in proper order. It was proved

that all switches were liable to get out of order. A train of the W. J. Company coming slowly up to the station, ran into the siding instead of on to the platform line in consequence of the points not being locked or held over for the latter line, and came in collision with some trucks standing in the siding, whereby B., who was a passenger in the train, was killed:—*Held*, that there was negligence on the part of the W. J. Company, and that that company and not the M. & C. Company were liable to an action.[144]

Defective Turn-table.—At a junction of two lines upon the defendants' railway, there was a turn-table which had originally been constructed for a single line, but when it came to be used for the double line it was braced and strengthened for one line but not for the other, and one of the defendants' servants was killed by the falling over of a carriage caused by the breaking of the turn-table, on the side of which there was no additional bracing. In an action brought by the personal representative of the deceased, it was held that there was no evidence of negligence on the part of the defendants in not employing competent persons to make or alter the turn-table.[145]

Defective Machinery.—When the safety of passengers is not in question, a carrier has a right to carry on his business on his own premises in such a way as he may think fit, and so far as the conduct of such business is concerned to use defective machinery, *e.g.*

for hoisting goods, &c., on his own premises, merely compensating the owners for injury done thereby to their goods. It has been held that a carrier is not liable in an action for damages *quoad* a third party lawfully on his premises who, without invitation by words or conduct on the part of the carrier or his servants so to do, chose to pass under a heavy package of goods which was in the act of being hoisted by a crane, and which slipped the sling by which it was defectively suspended, and fell upon and killed him whilst so passing under it, there being another way by which he might have gone without passing under the package in question, and the carrier's servants having no reason to expect that people would pass under it.[146]

Level Crossings.—Clause 2 of Section 43 of the Railway Act enacts, that whoever at any time, in the absence of a gate-keeper, omits to shut and fasten any gate which the railway administration has set up on either side of the railway across any road for the use and accommodation of any person, as soon as he and any vehicle, animal, or other thing under his charge have passed through, shall be punished with fine which may extend to 50 rupees. This Clause protects a railway administration from liability for the consequences of an accident arising from the illegal omission of a stranger to close any such gate, provided always that there has been no negligence on the part of the railway servants.

In every suit brought to recover damages for injuries sustained by the plaintiff in crossing the defendants' line of railway, the question for the court to determine is whether there is any evidence of negligence on the part of the administration or its servants.[147] A passenger while crossing the line at a level crossing was run over and killed by an over-due express train. At the time of the accident one of the swing-gates of the crossing was partially open, and there was no gate-keeper :—*Held*, that this circumstance constituted an invitation to the deceased to cross the line, and that the defendants were guilty of negligence.[148]

In another case, the defendants' railway passed on a level a public footway; and on each side of the line were swing-gates through which passengers entered. At one of these gates the view up and down the line was obstructed by the piers of a railway bridge which crossed it, but near the line there was a clear view of 300 yards in each direction. A woman who approached the line by that gate waited until a luggage train had passed, and immediately afterwards proceeded to cross the line, when a person on the other side twice called out to her, but being deaf she did not hear, when an express train which the luggage train had prevented her from seeing knocked her down and killed her. Thirty-six passenger trains passed along the line daily beside luggage trains. No person was stationed at the crossing to warn passengers of danger, but caution boards were

placed there:—*Held*, that these facts did not show negligence on the part of the railway company.[149]

A railway crossed on a level road near a station. On each side of the line there were gates across the carriage-way which were kept locked, and a swing-gate for foot passengers. The latter was so arranged that when opened it closed of itself, and there was an apparatus communicating with a lever, in a signal-box a short distance off, by which, when the lever was pushed forward, a ring dropped on to the gate so as to fasten it, and it was usually fastened in this way when trains were approaching. The deceased, who was in the habit of crossing the line daily, came up to the gate, and *the ring was then up and the gate free*, but a coal train was standing on the line across the road. As soon as the coal train was gone, the deceased, who was deaf, proceeded to cross the line without looking to the right or left. While crossing the up line and the six-foot way, from which there was a clear view up the line of from three hundred to five hundred yards, three persons shouted out to him to warn him of the approach of a train on the down line, but he did not, however, appear to hear them, but walked straight on and was knocked down by the train and killed:—*Held*, that under these circumstances the accident was caused by the negligence of the deceased; that there was no evidence of negligence on the part of the company; and that the fact of the ring being up, being only the

omission to use a precaution which the company were not bound to use, could not be considered as an invitation to the public to come on the line, or be made the foundation of a right of action.[150]

In an action brought against the Midland Railway Company, it appeared that the deceased, having arrived at a station upon the defendants' line of railway, got out in safety and walked along the side-path, which she was well acquainted with, and proceeded to cross the line by the appointed level crossing in order to leave the station. At the moment she stepped on the line, a train, which she could have seen if she had looked, arrived at the same spot, and she was knocked down and killed:—*Held*, that there was no evidence of any negligence on the part of the defendants, it not being negligence in them not to have a person stationed on the spot to warn passengers about to cross the line of the approach of a train, of which, if the passengers used due care, they might inform themselves.[151]

Entering Train whilst in Motion.—Any person who gets into or upon, or attempts to get into or upon, or quits or attempts to quit any carriage upon any railway while such carriage is in motion, commits a penal offence under the Railway Act; and if such person receive any injury while so doing he is said to be the author of his own misfortune, and cannot recover from the railway administration, even although he may have been induced to attempt to get into the carriage

by the invitation of one of the railway officials. A case of this nature has recently been decided by the Supreme Court of Judicature of England, in which, although judgment was given for the plaintiff, the Court intimated that had the defendant company rested their defence upon the wrongful act of the plaintiff and the weakness of his case instead of setting up two cases each inconsistent with the other in their own defence, they would probably have succeeded in obtaining a verdict. The case was tried on appeal before *Brett*, *Cotton*, and *Thesiger*, Lords Justices, and the following is a statement of the case and the judgment of the court.

The plaintiff was trying (having got into the wrong carriage) to change his carriage, and was getting into another just as the train moved on at the station. A porter, perceiving his position, pushed him in; but, not securely fastening the door, the plaintiff fell out, and his leg was so crushed between the train and the platform that he ultimately had to lose it by amputation. At the trial, the plaintiff stated that the porter, as it appeared to him, fastened the door or slammed it to in the usual way, and two or three witnesses said the same, though the porter denied it. The case for the company was that the porter merely did his utmost to save the plaintiff from a position of peril into which he had put himself by his own carelessness, and that he had not got in, and that the porter had closed the

door effectually, as the porter swore, though other of the company's witnesses said he had no time to fasten the door, so that the plaintiff brought the injury on himself. Lord Coleridge, however, thought that, although (as was admitted) the plaintiff was to blame for trying to get into the train as it was moving, and if he had fallen in so doing would have had only himself to blame for it, yet that if he had got into the carriage his previous fault in getting into it was immaterial, and that then if the accident arose through the failure of the porter to shut the door effectually, the plaintiff would be entitled to recover, and he left it to the jury whether the plaintiff got into the carriage, whether the porter pushed him in and shut the door, and whether he shut it effectually, and on these questions they found in favour of the plaintiff, and gave their verdict for him —damages 250*l*. Upon application, however, to the Judges of the Common Pleas Division, on the part of the company, for a new trial, two Judges of that Division (Mr. Justice *Lindley* and Mr. Justice *Lopes*) directed a new trial, a decision from which the plaintiff appealed.

Brett, Lord Justice, delivered judgment in favour of the plaintiff. No doubt, he said, it was for the plaintiff to prove that the accident was caused, and solely caused, by the negligence of the company's servant—that is, that the porter had time to close the door, and had closed it imperfectly. The porter, however, had

sworn that he had closed the door effectually, though one or two other of the company's witnesses said he had not time to do so. Lord Coleridge had left the questions on the evidence to the jury, telling them that if the plaintiff's case was true, that he had got into the carriage and that the porter had closed the door imperfectly, then he would be entitled to recover, and that was quite correct; and it was not to be wondered at that, as the company made a double case at the trial, they should have failed. The company, in fact, had set up an inconsistent case at the trial, and so had failed, though, had the case rested only on the plaintiff's evidence, he might properly have failed. Under these circumstances it would be wrong to grant a new trial, and so the appeal must be allowed, and the decision for a new trial must be set aside.

Cotton, Lord Justice, said he concurred, and but for the fact that they had the misfortune to differ from the two Judges of the Common Pleas Division, he should have said no more. He added, however, that there was no complaint of misdirection by Lord Coleridge, and the right questions had been left to the jury. The company at the trial had not relied, as they might, perhaps, have done, on the view that there was not time for their porter to shut the door, and had called the porter to swear that he had, in fact, closed it, and closed it effectually. It would be wrong to grant a new trial in order to enable a party to set up a case incon-

sistent with that which he had set up at the former trial.

Thesiger, Lord Justice, said he had come to the same conclusion, though with some reluctance, because he considered the case for the plaintiff was very weak, and if the company had rested upon its weakness they might have succeeded; but the company, instead of resting upon its weakness and asking the jury to say that under all the circumstances in the position in which the plaintiff had put himself their porter had not time to close the door effectually, they called him to show that he had done so, and then called others to show that he had not time to do so, and thus, setting up two cases quite inconsistent with each other, it was natural that neither should have been credited, and that thus they should have failed at the trial. In such circumstances it would not be right to set aside the verdict against them and direct a new trial. Consequently, judgment must be for the plaintiff, the appeal allowed, and the order for a new trial reversed.

Self-preservation.—Carriers are bound to make use of all the ordinary precautions for the safety of the passengers on the road. If the driver of a coach is guilty of rashness, negligence, or misconduct, or if he is unskilful, or deviates from the acknowledged custom of the road, the proprietor will be responsible for any injury resulting from his acts. So also if there is danger in any part of the road, or in a particular passage, and the

driver omits to give due warning to the passengers, so if he takes the wrong side of the road, and an accident happens from want of proper room.

The liability of the carrier is the same although the injury to the passenger is caused by his own act, as by leaping from a train or coach under such circumstances as give him reasonable grounds for believing that his remaining in the train or coach will be attended with real danger, and the peril arises from the want of due skill or care on the part of the carrier or his servants. And it will not make any difference in the case that by such attempt to escape the passenger has incurred greater peril, or even occasioned the coach to upset, and has thereby caused the injury to himself.

In an action brought against the Great Western Railway Company, it was shown that the plaintiff was travelling alone in a second-class carriage from West Drayton to Uxbridge, and was sitting close to one side of the carriage looking out. He got up, walked across to the other side of the carriage and put his hands upon the door, which at once sprang open. The left hand immediately lost its hold, but he grasped the door with his right hand and arm, and hung on to it whilst it was open. He was carried in this way some three hundred yards or more, when, seeing the pier of an arch over the line ahead of him, and fearful of coming in contact with it, he let go and endeavoured to throw himself across a bush below him; but not having made allowance for the

momentum of the train, missed the bush and fell on the line. He was afterwards found on the ballast much injured. After the evidence had been recorded, a verdict for the plaintiff was taken by consent.[152]

Runaway Horses.—Any person injured by a runaway horse may recover damages from the owner unless the latter is able to prove that he exercised reasonable care in his management of the animal. In a suit instituted against the North Metropolitan Tramway Company, it was shown that the plaintiff, a carman, was driving his horse and van at a walking pace, when a runaway horse belonging to the defendant company came in collision with his van with such violence that the animal was killed on the spot, the plaintiff and his horse injured, and the van damaged. The defendant company denied the alleged negligence, and contended that they were not liable, as the accident was due to causes beyond their control. It appeared that the horse, which they had worked daily for the previous nine months, and which up to the time of the accident had been found perfectly quiet, had been frightened by the loud shrill whistle of an engine when passing under a railway bridge, and, after breaking the reins and harness and the whipple-tree, had rushed down the street at full gallop. For the plaintiff it was contended that the fact of the breaking of the harness and the splinter-bar was in itself evidence of negligence in the defendants not

providing proper gear. The court found for the defendant company.[153]

Kicking Horses.—In the case of a public carriage, the owner is bound to provide proper horses, and such as will not unduly endanger his passengers. In the event of an accident arising from their unfitness, it is not necessary to show that the owner was aware of their unfitness.

A passenger in an omnibus was injured by a blow from the hoof of one of the horses, which had kicked through the front panel of the vehicle. There was no evidence on the part of the plaintiff that the horse was a kicker; but it was proved that the panel bore marks of other kicks, and that no precaution had been taken by the use of a kicking strap or otherwise, against the possible consequences of a horse striking out:—*Held*, that there was evidence of negligence on the part of the defendants.[154]

Negligent Driving.—In an action brought to recover damages for personal injury received by a passenger in a tramcar, it was shown that as the plaintiff was leaving one of the defendants' tramcars, she was struck in the back by the pole of a second tramcar which had been negligently driven too close to the first vehicle. The negligence was admitted, and, a compromise having been effected, a juror was withdrawn.[155]

Damage without Physical Injury.—An action is maintainable for damages on account of negligence,

although the plaintiff may have sustained no physical injury. In a suit instituted in the Court of Common Pleas against the Great Eastern Railway Company, it appeared that the plaintiff was an invalid, and in August 1879, being at the time ill in bed, she was startled by a noise, which proved to be the crash of a broken window pane, some of the glass of which fell on her bed. The cause of the crash was the pole of a van driven by one of the defendants' servants, the horses of which had run away. The consequences to the plaintiff, according to the evidence, were serious. She sustained a severe mental shock, which made her frequently hysterical, and incapacitated her from attending to her daily duties in the house.

The case was tried before *Coleridge*, C.J., and a special jury, and Lord Coleridge in summing up observed that he did not attempt to disguise from the jury that he viewed the case with the greatest suspicion. None of the symptoms of subtle nervous shock which result from railway accidents were wanting in the case, but as a rule these symptoms followed upon some physical jar to the system, whereas here the plaintiff had been absolutely untouched. At the same time extraordinary things were sometimes true, and it was for the jury to say whether they thought this was one of them.

The jury, after a long deliberation, could not agree in their verdict, and were discharged.[156]

Privity of Contract.—An action will not lie against a railway administration at the suit of a master for personal injuries sustained through its negligence by his servant, whereby the services of the servant are lost to the master, where the contract out of which arose the duty to carry safely was between the administration and the servant.[157]

It will thus be seen that in all suits instituted against carriers of passengers for damages on account of personal injury, negligence must be proved against the carrier, or such evidence put forward that negligence may be legally presumed against him to render him liable to the plaintiff. All carriers of passengers, but more particularly carriers by railway, are bound to use the best means and precautions in known practical use to secure the safety of passengers using their conveyances, but not every possible precaution which the highest scientific skill according to speculative evidence might have suggested. And where there are several grounds of negligence suggested, the Court must be satisfied that some one or other existed.[158]

CHAPTER V.

PASSENGERS' LUGGAGE.

Duties and Liabilities of Carriers.—In the absence of any contract, rule, notice, or custom to the contrary, it is incumbent upon every carrier of passengers for hire to receive with each passenger a reasonable quantity of personal luggage, and to carry the same safely. The carrier has a right to limit the quantity as to weight and bulk, and to make what rules and regulations he pleases as to the terms upon which he is willing to carry it, provided, as a general rule, that such conditions are not unreasonable.

The extent of the liability of carriers by railway and in ships is ordinarily fixed by statute, but when this is not done the law imposes upon all carriers coming within the definition of 'common carrier,' as contained in the Carriers' Act of 1865, the same legal obligation in respect to passengers' luggage as it does upon carriers of goods, and they are answerable for such luggage according to the degree of liability imposed

upon them by the enactments to which they are subject.[159]

A carrier by railway in British India is exempt from all liability for loss, deterioration, or destruction of or damage to passengers' luggage in all cases, unless such luggage has been booked and a receipt given for it by one of the railway servants.[160] But carriers who do not come within this protecting clause in the Railway Act are answerable for unbooked luggage which is carried by the passenger with him. It has been held that if a man travel in a stage-coach and take his portmanteau with him, though he has an eye on the portmanteau, yet the carrier is not absolved from responsibility.[161] There is nothing more common than for persons to put part of their luggage into the same carriage with them, and that may be done in such a way as never to cast any responsibility on the carrier, but that is to be proved. When this is done by the carrier's servants, the carrier is not relieved from his liability in respect of it. So the fact of a passenger taking a valuable article openly and notoriously into the carriage with him will not save the carrier from responsibility.[162]

But the luggage must consist of articles of personal use or convenience, and not merchandise or valuables, although carried in a trunk, otherwise the carrier is not liable in case of such luggage being lost in transit: unless he has received the luggage knowing that it is goods or merchandise.[163] Let us suppose that a

railway administration, on whose line the plaintiff was a passenger, had publicly announced that it would not take merchandise as passengers' luggage, and that if a passenger took merchandise with him he was to pay a certain rate for its carriage. Let us further suppose that this rule was known to the plaintiff; but, nevertheless, that he took with him into the carriage a case containing merchandise, not stating to the railway officials what its contents were. Under such circumstances the railway administration would not be liable for its loss, for the plaintiff, in breach of the bye-laws, intended to have the goods conveyed in the carriage with him free as luggage, to escape the obligation of paying for their conveyance as merchandise. Upon the facts put, there could not exist in law or in reason any contract touching those goods upon the breach or in default of the performance of which the plaintiff could have a right enforceable against the railway administration.[164]

The plaintiff, while travelling as a passenger by the defendants' railway, lost a box which had been received by the defendants as part of his personal luggage, and placed in the van. He had recently returned from Canada with the intention of settling in England, and the box contained six pairs of sheets and a like number of blankets and quilts, which had formed part of his household goods in Canada, and which he intended to be again part of his household goods when he should

have provided himself with a home:—*Held*, that although a pair of sheets or the like taken by a passenger for his own use on a journey might fairly be considered as personal luggage, yet that a number of articles of this description, intended not for the use of the traveller on the journey but for the use of his household when permanently settled, could not be so regarded, and that the defendants were not responsible for them.[165]

Excepted Articles.—Section 2 Act iv. of 1879 (The Indian Railway Act) enacts that when any property mentioned in the second schedule thereto annexed is contained in any parcel or package delivered to a carrier by railway, the carrier shall not be liable for loss, destruction, or deterioration of, or damage to, such property, unless at the time of delivery to the carrier the value and nature thereof have been declared by the person sending or delivering the same, and an increased charge for the safe conveyance of the same, or an engagement to pay such charge, has been *accepted* by some railway servant *specially authorised in this behalf.* And it further declares that, when any property of which the value and nature have been declared under this section has been lost, destroyed, or damaged, or has deteriorated, the compensation recoverable for such loss, destruction, damage, or deterioration shall not exceed the value so declared.

This section *absolutely* exempts carriers by railway

from *all* liability for such articles as are specified in the schedule (*vide* Appendix, p. 391), and they cannot be made responsible even if the articles are stolen while in transit by one of their own servants.

The Carriers' Act of 1865 contains a somewhat similar section, in which common carriers are declared not to be liable for loss of or damage to property delivered to them to be carried exceeding in value one hundred rupees, and of the description contained in the schedule annexed to the Act, unless the person delivering such property to be carried, or some person duly authorised in that behalf, shall have expressly declared to such carrier or his agent the value and description thereof. And further that the carrier may require payment for the risk undertaken in carrying such property.

There is a wide difference between these two sections of exemption: under that in the Railway Act, in order to charge the carrier with liability, not only must the value and nature of the articles be declared by the sender, but an increased or insurance charge *must* be paid and be *accepted* by an authorised railway official; but under the Carriers' Act an express declaration of the value and description of the property need only be made, and the carrier may or may not levy an increased charge, but whether he do so or not his liability is fixed by the sender's declaration.

When a carrier of passengers is not liable as a common carrier for passengers' luggage, he is responsible as

a bailee for hire, although nothing may be paid him for the conveyance of the luggage. The carrying of luggage being accessory to the principal contract to carry the passenger, no price need be paid for it to render the carrier responsible, unless it is above the stipulated weight allowed free with each passenger. And it would appear reasonable, that even if the passenger's fare is not paid, the carrier should be responsible for a loss or injury to his luggage; for the passenger is liable to pay his fare, and the carrier assents to the contract by permitting him to travel without prepayment. This would of course be otherwise if the passenger was travelling with intent to avoid payment.

To sustain an action against a carrier for the loss of a passenger's luggage it is unnecessary to prove negligence, although the plaintiff may allege it. The non-delivery of the luggage is *primâ facie* proof of negligence, and, according to the decision in the case of *Podul Singh* v. *Thompson*, the onus of proof lies on the carrier to rebut the presumption of negligence.[166]

A Proprietor of a Dâk-carriage is not liable as a common carrier for the luggage of the passengers who travel by his carriages, but he is responsible as a bailee for hire. In a case under appeal before the High Court of the North-western Provinces, the Court laid down the following ruling on this point:—

'A person carrying on the ordinary business of a proprietor of dâk-carriages does not come within the

term "Common Carrier" as that term is understood in English law. Such a person is bound to exercise reasonable and ordinary care in respect to luggage entrusted to him, but is not responsible for any loss which may not arise from the negligence or default of himself or his servants, he not being a common carrier bound to insure the safe conveyance of the luggage against all risk, save the act of God or of the Queen's enemies. He is to be regarded as a bailee for hire, and the fact that he does not deliver the luggage at the end of the journey should be accepted as *primâ facie* proof that the loss has been occasioned by negligence for which he is responsible, and, consequently, the *onus* of proof lies on him that reasonable care was exercised by him. In the case before us it is alleged that the luggage for the loss of which damages are claimed was delivered to the defendant's servants, and was stolen from the roof of the conveyance in which the plaintiff was travelling; and assuming this to be proved, we hold that the defendant, in order to clear himself from liability, is bound to establish that his servants used ordinary precautions to prevent the loss.'[167]

Government as a Carrier.—The Government of India is not liable as a common carrier for the loss or damage to passengers' luggage booked to be carried by the Government bullock-train, mail vans, or carts, or by any State railway, as the Carriers' Act specially

excepts the Government in the definition of 'Common Carrier' given therein. But it is responsible in a lesser degree as a bailee for hire for any negligence on the part of its servants in performing the duties of its ordinary business as a carrier (unconnected altogether with the exercise of sovereign powers), in the same way as any private company or individual carrying on the same business would be.[168] *Vide post*, p. 225.

Hackney Coaches and Cabs.—Upon the same principle as laid down in the above ruling as to the liability of proprietors of dâk-carriages, owners of hackney coaches, cabs, and such like vehicles are responsible only as bailees for hire, and as such are bound to use an ordinary degree of care.[169]

Delivery of Luggage at Destination.—A carrier is bound to deliver the luggage at the end of the journey, at the customary place of delivery, and his liability continues until he has done so; for where it is the usual custom to deliver, there he must deliver safely.

An action was brought against the London Brighton and South Coast Railway Company to recover for the loss of a dressing-case which had been placed in a carriage under the seat of the passenger. Upon the arrival of the train in London, the porters of the company proceeded to place the luggage in a hackney coach, and the servant of the plaintiff, being about to assist them with small parcels, was told by them not to trouble herself, as they would see to them.

Upon the hackney coach arriving at its destination, the dressing-case in question was not to be found. The judge at the trial left it to the jury to say whether the company had received the dressing-case for the purpose of conveying and delivering it, and whether they had performed that part of their contract, and under his direction the jury gave a verdict for the plaintiff.

On these facts the Court held that the duty of the company as common carriers continued until the luggage was placed on the hackney carriage, *Cresswell*, J., saying: 'They could not be said to have fulfilled their contract without delivery, and if it was the usual course to deliver the luggage of passengers at a particular part of the platform, that was the sort of delivery the defendants took upon themselves to make.'[170]

Contra: A passenger in a railway carriage was ordered to leave it by the company's servants, under circumstances which did not justify them in what they were doing, and upon leaving the carriage he left a pair of race-glasses on the seat, which, as the train proceeded on without him, were lost. Upon action brought, it was held that the loss of the glasses was not the natural result of the wrongful ejectment, and that the plaintiff could not recover their value from the company.[171]

If a carrier, after the luggage has been delivered to a passenger, allow his servants to carry the luggage

from the place of delivery to a cab waiting outside the station, it seems his liability would continue until the luggage was actually loaded upon the cab.[172]

Lien.—Where a carrier conveys a passenger and his luggage, he has a right to detain the latter until payment of his fare, whether the luggage has been booked or not, but the carrier has no right to detain the person of the passenger, except in cases coming under Section 32 of the Railway Act, or the clothes which he is actually wearing, or to take property, such as umbrellas, rugs, greatcoats, walking-sticks, or hand-bags, out of the manual possession of the passenger.[173] If a passenger book himself to go by a particular coach or other conveyance, and leaves his portmanteau, but does not go by the coach, the carrier will have a lien for something, though not for the whole fare.[174]

Luggage by Excursion Trains.—Where a passenger by an excursion train, knowing that the railway company did not allow passengers to carry luggage by such trains, nevertheless secretly put luggage into the train, it was held that there was an implied promise by the wrong-doer to pay the railway company for the carriage of the luggage.[175]

Delay in Delivery by Carrier.—If the carrier *delay* the delivery of a passenger's luggage, he will be liable for damage arising therefrom, even though it consist of excepted articles. But if the *delay* in delivery of luggage containing excepted articles, that have not

been declared has been occasioned by a *loss*, or even a temporary loss of the luggage, the carrier would be excused.[176]

Booking of Luggage to Foreign Railways—Contract.—If a carrier by railway accepts luggage for conveyance to a particular destination beyond the limits of his own line of railway, and receives one entire payment for the whole journey, and the luggage is lost whilst in the hands of another carrier to whom it has been delivered to be forwarded, the first carrier is responsible for the loss, as being the party contracting with the consignor, or consignee, for the conveyance of it. The plaintiff took a through ticket from Newport station on the South Wales Railway to Birmingham on the Midland Railway, and his portmanteau, which had been booked at Newport, was lost in transit, but on which railway could not be ascertained:—*Held*, in an action for compensation brought by the plaintiff against the Midland Railway Company, that it was the South Wales Railway Company that were liable, inasmuch as they were the contracting company, and the contract was an entire contract to carry the portmanteau from Newport to Birmingham. The plaintiff was therefore non-suited, and judgment entered by the Court in favour of the Midland Railway Company.[177]

Packing of Luggage.—All luggage should be properly packed and directed by the passengers before it is delivered to the carrier, and if any loss or damage is

occasioned by its not being securely packed, the carrier will be excused. But if the carrier receives luggage, and has the opportunity of observing that it is not properly packed, he cannot afterwards avail himself of such neglect on the part of the passenger; and where a railway company received a passenger's luggage without its having any direction upon it, it was held that they could not set up the want of such direction as an excuse for its loss.[178]

Dangerous Luggage.—Section 16 of the Railway Act enacts that no passenger shall take with him on a railway, and no person shall deliver or tender for carriage upon any railway, any dangerous luggage or goods without giving notice of their nature to a railway servant; or, in the case of luggage or goods delivered or tendered for carriage, distinctly marking their nature on the outside of the package containing the same. Any railway servant may refuse to carry upon a railway any luggage or parcel which he suspects to contain dangerous goods, and may require such luggage or parcel to be opened to ascertain the fact previously to carrying the same; and in case any such luggage or parcel is received for the purpose of being carried upon a railway, any railway servant may stop the transit thereof until he is satisfied as to the nature of its contents.

This section relating to dangerous goods has evidently been inserted in the Act to meet cases similar to

those of *Her Highness the Begum of Bhopal* v. *The Great Indian Peninsular Railway Company*, and *Lyell* v. *Ganga Dai*, which were tried before the High Courts of Bombay and the North-western Provinces respectively, before the new Railway Act became law.

The first case was a suit brought against the Great Indian Peninsular Railway Company to recover the sum of 64,655 Rs. being the value of certain luggage, consisting of clothes, jewellery, &c., the property of the Begum of Bhopal and suite, which was handed over to the defendant company at Bombay for transmission to Hurdah, and not delivered to the owner at the latter station.

The plaint was filed in the Bombay High Court in 1875, and from the evidence it appeared that the van containing the luggage took fire *en route*, and, although every effort was made to save the property, the greater portion of it was destroyed. After the fire had been extinguished, a number of flasks and horns filled with gunpowder, matches, candles, and other articles of an explosive and dangerous nature were found amongst the débris. It was alleged by the plaintiff that the van had been robbed of its valuable contents while in transit by the servants of the company, and that these explosive and dangerous articles had been subsequently placed in the van by the thieves with the express intention of causing a fire in order to conceal the robbery. The defendant company answered by stating

that the property had been destroyed by a fire which was caused by the negligence of the plaintiff or her servants, and also claimed exemption from liability for the excepted articles of jewellery, &c., under the Railway Act of 1854 and the Carriers' Act of 1865.

The High Court, per *Bayley*, J., gave judgment for the plaintiff for 15,263 Rs., but disallowed the remainder of the claim for the jewellery and other excepted articles, for which the defendants were held not to be liable. The defendants filed an appeal against this decision, and the Appellate Court, *Westropp*, C.J., and *Sargeant*, J., held that the evidence showed that there had been negligence on the part of the Begum or her servants in placing the powder-flasks, matches, candles, &c., with the luggage, and, rejecting the allegation of the waggon having been robbed by the company's servants, reversed the judgment of the lower court and gave a decree for the defendant company.[179]

In the case of *Lyell, appellant*, v. *Ganga Dai, respondent*, the plaintiff's husband was in the service of the East Indian Railway Company at Allahabad, and entrusted with the duty of despatching goods. On November 29, 1872, the defendant Lyell, through his servant William Henry Pollard, sent to the Allahabad railway station a box containing combustible and dangerous substances, for despatch to Gwalior, without notifying the contents, as he was bound by law to do,

and the said box was placed as usual in the railway station, near the very place where the plaintiff's husband was performing his duty. Suddenly the said box exploded, and thereby the plaintiff's husband was wounded in so serious a manner that he died from the effects of the injuries he had received, and a suit was instituted by the widow to recover compensation for the loss she had sustained.

The defendant alleged in his written statement—(1) that the box in question did not contain any combustible or dangerous substance, as asserted by the plaintiff, and that the occurrence of the explosion was still a mystery to all experts in chemistry; (2) that there was no reason to suppose that the plaintiff's husband lost his life through the omission to declare the contents of the box in question, for even if it had been marked 'dangerous' there would be evidence to show that the railway authorities would have placed the box precisely where it was located before despatch, and the deceased would have presumably dealt with it in no different manner than he did when the explosion unaccountably took place; (3) that the amount of damages laid was grossly excessive.

It appeared at the trial that on November 19, 1872, the defendant, who carried on the business of a chemist in Allahabad, received from a customer at Gwalior an order for certain chemicals, and among others for a certain detonating powder. He delivered this order to

an assistant, Mr. Pollard, a qualified chemist, directing him to execute it, and to despatch the articles. The defendant had previously supplied his customers with detonating powder composed of equal parts of black sulphuret of antimony and chlorate of potash. These ingredients *were not compounded in the shop, but sent in separate bottles.* On this occasion, however, Mr. Pollard, without having received any express orders, prepared a detonating powder composed of one part sulphur and three parts of chlorate of potash, and these ingredients he compounded and placed in one bottle.

Having delivered the articles ordered to the packer, Mr. Pollard went to the defendant and consulted him about it. The defendant inquired how he had prepared the detonating powder, and Mr. Pollard informed him. The defendant observed that he supposed the ingredients had been placed in separate bottles. Mr. Pollard replied that they had been placed in one bottle. The defendant inquired if that was quite safe. Mr. Pollard replied that he had frequently made it in England and kept it so. He added that the bottles were being packed, and he would *mark the box 'dangerous,'* as a precautionary measure, to be taken care of by the railway company. The bottle contained in all 1 lb. of detonating powder, was wrapped in paper and tow, and placed with seven other bottles (similarly prepared) in a box which was sent by a coolie to the railway station to be despatched by passenger train. The

forwarding note which was sent with the box contained no description of the character of the contents. The box was not marked dangerous, nor was any notice given, nor did anything exist which could suggest to the servants of the company that the box contained any explosive substance, or that it required care in manipulation.

The box was weighed and placed in the parcel room. Outside the door of the parcel room is a semi-circular counter, boarded to the floor, with an opening in the centre affording passage to the parcel room. The space inclosed by it is of limited extent. After attending to his duties in connection with a train which was leaving the station, the deceased, whose duty it was to receive parcels, directed the coolie to bring the box from the parcel room. He did so, and placed it inside the counter and near the passage. The deceased, standing at the counter, commenced to write the usual receipt, and, while he was engaged in doing so, the contents of the box exploded. The front of the counter was blown out, the deceased severely wounded, and he died from the effect of the injuries sustained.

There was no direct evidence as to the cause of the explosion. A clerk who was speaking to the deceased at the time stated that he could not see the box from where he was standing. The coolie who carried the box deposed that the Baboo was writing the receipt when the box exploded and he ran away; that he

carried the box on his head to the railway station, and that it did not tumble down on the way, nor when it was weighed, nor afterwards, and that it received no shock in any way. The station-master of Allahabad, in cross-examination, stated that he did not know what the deceased would have done with the box if it had been marked '*dangerous*,' but if it had been so marked it was the clerk's duty to have reported the fact to him. In the meanwhile, of course, he would have allowed the box to remain on the platform. There was no place in the Allahabad station for keeping such parcels.

In the opinion of the experts examined, the explosion might have been due to the application to the detonating power of some external agency, such as friction or percussion. Two of these experts stated that the spontaneous explosion of a detonating powder so composed was a thing unknown. The third, assuming that the box suffered no violence of any sort, was of opinion that the explosion might have taken place owing to chemical action having arisen between the ingredients constituting the detonating power.

The Court of first instance, holding it proved that the box contained some dangerous chemical preparation, that its dangerous character was fully known to the defendant and his servants, that the omission of the defendant to mark the box 'dangerous' amounted to a wrongful neglect or default which entitled the plaintiff

to maintain the suit, and that the death of the deceased was caused by such wrongful neglect or default, gave the plaintiff a decree for 5,253 Rs.

The defendant appealed to the High Court, when a modified decree for 3,000 Rs. was made; but as the judges (*Stuart*, C.J., *Pearson*, J.) differed in opinion, the defendant, under clause 10 of the Letters Patent, appealed to the full Court, with the result that the decree of the lower court was affirmed and the appeal dismissed with costs.[180]

Conditions on Luggage Ticket—Liability.—A passenger is not bound by conditions indorsed on a luggage ticket limiting the liability of the carrier unless it be proved that he assented directly or indirectly to such conditions. The respondent became a passenger in a steamer of the appellants from D. to W., and received a luggage ticket on the back of which was printed a notice exonerating the appellants from liability for loss, injury, or delay to the passenger or his luggage, however caused. There was no evidence that the respondent had been made aware of this condition before or at the time he took the ticket. During the voyage the steamer was lost by the negligence of the servants of the appellants, and the respondent lost his luggage, and suffered much damage and inconvenience:—*Held*, by the House of Lords, that, in the absence of proof that the respondent had assented to be bound by the condition indorsed on

the ticket, it was no defence to an action by him to recover damages for the loss he had sustained.[181]

Left Luggage—Cloak-room—Liability.—Where a person delivers a parcel at the cloak-room of a railway station, and receives a ticket with conditions on the back limiting the railway company's liability, he is not bound if he does not know there is writing on the ticket; but if he knows that there is writing containing conditions, he is bound. If he knows that there is writing, but does not know that it contains conditions, he is bound also if in the opinion of the court reasonable notice is given that the ticket contains conditions.[182]

Bill of Lading for Luggage.—The Atlantic Steam Navigation Company issued passenger tickets on which was printed a condition that the company would not be responsible for luggage unless a bill of lading had been signed therefor:—*Held*, that the company had a right to impose this condition on their passengers provided it was imposed upon all alike.[183]

Over-carriage of Luggage.—The protection afforded to both carriers by railway and common carriers by statute extends to a case of damage to excepted articles happening during their over-carriage.[184]

Privity.—As the duty thrown upon the carrier by receiving the passenger and his luggage to be carried for reward, though arising out of a contract, is independent of the question by whom the reward is paid, a

railway company has been held liable for the loss of his luggage to a servant whose fare has been paid by his master. But a master cannot recover for the loss of his portmanteau taken by the servant with his own luggage, or booked by the servant as his own, the servant paying his own fare.[185]

CHAPTER VI.

LIABILITY FOR DELAY TO OR LOSS OF TRAINS.

Liability for Delay.—A carrier of passengers is bound to carry and deliver them according to his contract. If he undertakes to start, and to arrive at the termination of his journey at a stated time, he will be responsible for not doing so whereby damage accrues to a passenger, unless prevented by the act of God, the Queen's enemies, or inevitable accident.

Carrier may limit his Liability for Delay.—The time-tables of a railway administration usually, if not always, contain an express stipulation that it does not guarantee the arrival and departure of trains at the times specified therein, and when this is the case the only relevant duty which the law raises out of the contract is that the passenger shall be carried within a reasonable time. What is a reasonable time is a question of fact.

Unreasonable Condition.—A condition in a time-table to the effect that the railway administration issuing it will not be responsible for any delay from what-

ever cause arising is repugnant to public policy, if not to positive law, and therefore void; and such a condition would not avail the carrier if the delay complained of were unreasonable or wilful.

Inevitable Accident or Obstruction.—The fact of an inevitable accident having happened, or of some natural impediment having presented itself to the continuance of the traffic along a line of railway, might relieve the railway administration from responsibility in respect of damage resulting from complainant's detention which otherwise would have attached to it.[186]

The plaintiff took a ticket from C. station to D. station on the defendants' line, and after waiting some time was told by a porter that the train was late in consequence of an accident. The train eventually arrived an hour and a half late. The consequence was that the plaintiff was late for the train at G. junction, which train would have carried him on to D. The train time-bill was not put in evidence, but only some correspondence in which the company repudiated their liability on the ground that by their time-bills they gave notice that they would not be liable for the trains not keeping time:—*Held*, that there was no cause of action.[187]

Evidence of Contract.—To support an action against a carrier by railway for damages on account of delay caused through the missing of a train by which the complainant had intended to take or to continue his

journey, the ticket issued to and paid for by the passenger, the time-table or table of trains issued by authority of the railway administration concerned, and extrinsic facts which might show a contract or undertaking by the defendants, must be given in evidence.

The language of the ticket indicates simply that the defendants will convey the plaintiff from A. to B. by the specified line of railway; but the mere taking of a ticket for a journey by railway does not in itself amount to a contract on the part of the railway administration, or impose on them a duty to have a train ready to start at the time at which the passenger is led to expect it.[188]

In addition to the two items of evidence above mentioned, a statement by an authorised official that the train in question would start, or would arrive, at a particular time, or admissions made on behalf of the railway administration in a correspondence with their manager or other accredited agent, would be legitimate evidence. The mere talk of or expression of opinion by a guard, porter, or such like servant of the company would not suffice to raise a specific contract such as adverted to.[189]

The time-table of a railway company stated that a train would leave A. station at 2.37 p.m., and arrive at B. station at 2.54. The plaintiff arrived at the former station at 2.20 p.m. and took a ticket to the latter station, after having been informed by a ticket collector

and a guard that a train which was then nearly due at A. would stop at B. This latter train did not arive at A. until 3 o'clock p.m. The plaintiff travelled by the train to C., a station beyond B., where it arrived at 4.45 p.m. The train had not stopped at B. The plaintiff, who had an appointment at B. for 3.30 p.m., took a cab and arrived there at 5 p.m., but too late to keep his engagement. The company's time-tables gave notice that although every exertion would be used to insure punctuality, the company could not guarantee that the trains would arrive or depart at the time specified therein, nor hold themselves responsible for delay or any consequence arising therefrom :—*Held*, that there was no negligence or want of care on the part of the company: that no contract or duty had been proved by which the company could be made liable.[190]

Misleading Time-tables.—If a railway administration publishes or authorises the publication of a time-table, representing that a train will run at a particular hour to a particular place, the railway administration impliedly undertakes to despatch a train at or about the time specified, and will be responsible for damages to all who tender themselves for conveyance at the appointed time and find that no train at all has been provided.

The Great Northern Railway Company, whose line communicated with the line of the North Eastern Railway Company at M., had arrangements by which

their trains starting from P. at 7 o'clock p.m., and going to M. were met there by a train of the North Eastern Company running from M. to H. by which passengers from P. to H. were forwarded. The Great Northern Railway Company published monthly time-tables, in which they stated, in the usual way, that the 7 p.m. train from P. carried to H. At the end of the month, after the Great Northern Railway Company's time-tables for the ensuing month were prepared in this form and printed, but before they were published, the North Eastern Railway Company discontinued the train from M. to H. The Great Northern Railway Company made no alteration in their time-tables already printed, but published and circulated them after they knew there was no such train. The plaintiff having seen one of the time-tables, made his arrangements on the face of it to go from P. to H. by the 7 p.m. train. He came to P. in time, went to the station, and there for the first time learned that he could go no farther than M. by that train. He was delayed on his journey and sustained damage, for which he sued the defendants:—*Held*, that he was entitled to recover, on the ground that the circulation of the time-tables amounted to a representation on the part of the defendants that there was a train, which was false to the knowledge of those making it, and calculated to induce the plaintiff to act as he did. *Held*, also, that the time-tables amounted to a contract on behalf of the company with those who

should come to the station to forward them as stated in the table, and that the defendants might be held liable as public carriers professing to carry to H. and bound to act up to their public profession.[191]

Loss of Train at Junction—Liability.—A passenger took a through ticket from Liverpool to Scarborough and had to change trains at York station, and through the unpunctuality of defendants' train he missed the train at York. The passenger thereupon took a *special* train from York to Scarborough, although he had no business or pressing engagement at Scarborough necessitating his being there at any particular time, and brought an action against the defendants to recover the amount paid for it:—*Held* by the Court of Common Pleas that the plaintiff was entitled to recover on the ground that where one party to a contract does not perform it, the other party may do so for him as near as may be, and charge him for the expense incurred in so doing. An appeal was filed by the defendants against the decision, and it was reversed on the principle that if one party fails to perform his contract the other may do so as *reasonably* near as may be, and charge him for the *reasonable* expense incurred in so doing; and a proper test of what is reasonable in such a case is to consider whether, according to the ordinary habits of society, a person delayed on his journey under circumstances for which the railway company were not re-

sponsible would have incurred the expenditure for a special train on his own account.[192]

In the case of *Hamlin* v. *The Great Northern Railway Company*, the plaintiff, a tradesman, took a ticket at London for Hull and had to change trains at Grimsby, but on arriving at the latter station found no train ready to take him on to Hull the same night, as there should have been according to the published time-table. He slept at Grimsby, and in the morning paid 1*s*. 4*d*. fare to Hull. In consequence of the delay he failed to keep business appointments with his customers, and was detained for many days:—*Held*, that he would have been entitled to have performed the journey from Grimsby to Hull at the expense of the defendants, but not having done so he was only entitled to a refund of the 1*s*. 4*d*. he had paid for his journey to Hull, with nominal damages and perhaps the cost of his bed at Grimsby.[193]

Tourist Tickets—Delay on Foreign Railways.—A carrier by railway is not responsible for any delay which a tourist or through passenger may suffer upon a foreign railway, provided due notice to that effect be given in the time-tables issued by him. The plaintiff took a tourist's ticket from the defendants, a railway company, on the faith of a programme of defendants' tourist ticket arrangements. On the back of the ticket was printed, 'This ticket is subject to the regulations and conditions stated in the company's time-tables and bills.'

Defendants' monthly time-tables stated that they did not hold themselves responsible for any delay, detention, &c., arising off their lines, nor for the correctness of the times over other lines. Plaintiff was detained by the unpunctuality of another company's train, and sued, to recover damages :—*Held*, that the plaintiff was bound by the monthly time-table, which with the ticket constituted the contract, and could not recover the expenses incurred through such detention.[194]

CHAPTER VII.

PAYMENT OF FARES BY PASSENGERS.

Prepayment of Fare.—Every carrier has a right to demand the prepayment of the fare when the passenger books his place; and if it is not prepaid, the seat may be occupied by another person.[195] In case only a part of the fare is paid and the passenger has not arrived and taken his seat when the conveyance starts, the carrier may fill it up with some one else. He would, however, be liable to return the money received, if he did so. So, on the other hand, if he kept the seat vacant throughout the journey, he could compel the person making default to pay that part of the fare remaining unpaid. If the whole fare has been prepaid, the passenger may take his seat at any stage of the journey.[196]

When Fare is not prepaid, it is not due until the whole journey is completed; and it seems that a passenger who has commenced a journey without prepayment of his fare, with the permission express or implied of the carrier, cannot be turned out of the

conveyance at any part of the journey upon demand and refusal to pay the whole fare; for the fact of permitting him to commence the journey must be taken as an acquiescence on the part of the carrier, and implies a contract to convey the passenger to his destination without prepayment, since it would be unreasonable, for instance, to expel the passenger at some intermediate station, port, or stage at any time.[197]

Fares by Railway and Canal must be the same to all persons alike. Carriers by railway and canal cannot make or give any undue or unreasonable preference or advantage to or in favour of any particular person, nor subject any particular person to an undue or unreasonable prejudice or disadvantage in any respect whatsoever.[198]

Carriers in Ships, and other Carriers, whose fares or prices are not fixed and regulated by statute, are only entitled to reasonable hire, and, in the absence of a contract, only the ordinary fare can be charged.[199] Where, however, one amount of fare is charged to A. and another to B. the fact of the lower charge having been levied may be used in evidence to show that the higher charge is unreasonable. It is not usual for carriers in ships to demand the prepayment of the whole fare.

Refund of Fare to Passenger.—A passenger may under certain circumstances legally demand refund of a fare paid in advance, where the carrier and the passenger are both under a mistake as to a matter of fact

essential to the agreement at the time the fare is paid by the passenger, as, for instance, when a passenger has paid his fare by a particular ship, boat, or train, and it turns out that before the payment was made the ship, boat, or train had been wrecked or disabled, so that the passenger cannot travel by it, the agreement is void and the fare must be refunded.[200] So, also, any passenger by railway to whom a ticket has been issued at any intermediate station, and for whom there is no room, can, on returning the ticket within a reasonable time after its issue, claim to have his fare at once refunded.[201] Again, if the contract be to start on a particular day, or at a particular and specific hour, time being essential to the contract, and this is not done, the passenger has a right to recover back the passage money.[202]

Any person removed from a railway carriage suffering from an infectious disease is entitled to a refund of his fare.[203] So also is a passenger who is relanded from a ship on account of sickness of himself or any member of his family.[204]

But where a passenger books himself by mistake to a wrong station, as, for instance, in the case of a passenger taking a ticket at Bombay to Gazerabad, under an erroneous impression on his part only that it is the junction station for Agra, instead of Toondla, it is optional to the carrier to make a refund or not of the fare for the distance not travelled over, as a contract is not voidable merely because it was caused by

one of the parties to it being under a mistake as to a matter of fact. It might be otherwise if both parties—*i.e.* the passenger and the booking-clerk—were under the same mistake in taking and issuing the ticket.[205]

Travelling without Payment of Fare.—By the Railway Act, every person desirous of travelling on a railway shall, upon payment of his fare, be furnished with a ticket specifying in English, and the principal vernacular language of the district in which the ticket is issued, the class of carriage for which, and the place from and place to which, the fare has been paid and the amount of such fare; and every passenger must, when required, *show his ticket* to any railway servant duly authorised to examine the same, and *must deliver up his ticket* upon demand to any railway servant duly authorised to collect the same.[206]

Penalty for being without, or not showing or delivering up, Ticket.—Any passenger travelling on a railway without a proper ticket or having such a ticket and not showing or delivering up the same when so required, is liable, under Section 31 of the Railway Act, to pay the fare of the class in which he is found travelling, from the place whence the train originally started, unless he can prove that he has travelled a less distance only, in which case he is liable to pay the fare of the class aforesaid only from the place whence he has travelled.

Recovery of Fare.—The above section further enacts that every such fare shall on application by a railway

servant to a magistrate, and on proof of the passenger's liability, be recoverable from such passenger as if it were a fine, and shall, when recovered, be paid to the railway administration.

After the refusal of a passenger to produce his ticket or pay his fare on alighting from a railway carriage, it is questionable whether he can be compelled to proceed by train to the principal station on the line, to be there dealt with by the railway authorities. Whether such a power exists or not, it is clear that the fare for such subsequent involuntary journey cannot be legally demanded.[207]

Right of Detention.—It has been ruled that a railway administration has no right to detain a passenger for the purpose of demanding his fare after he has refused to deliver up his ticket, where he offers to give his correct name and address, and there is no reasonable cause to suspect that he intended to defraud the administration.[208]

Season Tickets.—Holders of annual or season tickets for travelling upon a railway are bound to produce their tickets to the railway officials when required, the same as ordinary passengers.[209]

Servants' Tickets.—Where a master has purchased tickets by railway for himself and servants and retains them in his own possession, it seems the carrier would not be justified in refusing to carry the servant should he, by no fault of his own, be left behind at any station.

The plaintiff took tickets for himself, three grooms, and three horses by a certain train, which was afterwards divided by the railway servants into two parts, one being composed of passenger carriages and the other of horse-boxes. The plaintiff, who retained all the tickets in his possession, travelled by the first-mentioned portion of the divided train, leaving the grooms to follow in the horse-boxes with the horses by the second train. The defendants had a bye-law to the effect that no person would be allowed to enter any carriage without having first paid his fare and obtained a ticket. The grooms being unable to produce their tickets were prevented by the defendants' servants from entering the horse-boxes:—*Held*, that this was a breach of contract on the part of the railway company, for which they were responsible, notwithstanding the bye-law, as they contracted with the plaintiff and delivered the tickets to him and not to the servants.[210]

Evading Payment of Fare.—Any person who defrauds, or attempts to defraud, any carrier by railway—by travelling, or attempting to travel, upon any railway without having previously paid his fare; or by riding or attempting to ride in or upon any carriage, or by a train of a higher class than that for which he has paid his fare; or by using or attempting to use a ticket on any day for which such ticket is not available; or by continuing his journey in or upon any carriage beyond the place to which he has paid his fare, without

previously paying his fare for the additional distance; or who, in any other manner whatever, attempts to evade payment of his fare; or who wilfully alters or defaces his ticket so as to render the date, number, or other material portion thereof illegible, is, under Section 32 of the Railway Act, liable to a fine which may extend to fifty rupees, and to pay the fare, if any, which he ought to have paid.

A fraudulent intention on the part of the passenger is the gist of each of the offences provided for in the above section. Where a passenger took a return ticket from A. to B. and back, and after travelling from A. to B. returned to A. but instead of getting out at A. he intentionally over-rode to C. without taking a fresh ticket, though he offered to pay the excess fare, which was declined, and full fare from B. to C. demanded, it was held that, in the absence of an intention to defraud, he was only liable to pay the fare from A. to C.[211]

It will be seen from the wording of the section that it is the intention to evade payment which constitutes the offence. The evidence of the *intent* must, of course, depend upon the particular circumstances of each case; but in its absence it seems a railway administration would have no right to detain, and no right to expel, a passenger whom it had knowingly permitted to commence his journey without prepayment.[212]

Excess Fare for longer Distance.—A carrier is legally entitled to excess fare where the passenger travels *beyond* the station for which his ticket is available or in a different direction, although the fare to the station to which he travels may be the same or even less than that to which he has booked.

In the case of the *Great Western Railway* v. *Pocock*, which came before the Court of Exchequer on appeal from a County Court decision, this important question between carriers by railway and the general public was decided in favour of the railway company. The facts of the case were as follows: On April 2, 1879, the defendant took a return second-class ticket from Westbourne Park to West Drayton, for which he paid 2*s.* 6*d.* He travelled the down journey with the first half of the ticket, and retained the return half, which had the words 'West Drayton to Westbourne Park' upon it. He returned upon the same day in a second-class carriage, and on arriving at Westbourne Park, where the tickets were collected, remained in the carriage, and at the request of the ticket collector gave up the return half of the ticket, at the same time expressing his intention of going on to Paddington Station. The collector demanded the payment of 3*d.*, the second-class fare from Westbourne Park to Paddington. The defendant declined to pay anything, and travelled on to Paddington. The County Court judge held that as the defendant did not leave the carriage, but stated to the

collector that he intended going on to Paddington, and as the fare from West Drayton to Paddington was the same as from West Drayton to Westbourne Park, the defendant was not bound to pay anything.

The plaintiffs appealed against this decision, and *Huddleston*, B., reversing the decree of the lower court, gave judgment in favour of the railway company. *Hawkins*, J., who was the second judge, remarking that although it might be contended on behalf of the defendants that under certain circumstances a person might travel a greater distance for the same fare as he would for a lesser, yet the contract which had been entered into must be complied with, and as in this case the contract to carry from West Drayton to Westbourne Park had been performed by the railway company, they were entitled to excess fare for the journey from Westbourne Park to Paddington.[213]

Travelling in superior Class.—A passenger who had been convicted of travelling in a first-class carriage with a second-class ticket appealed to the Court of Queen's Bench against the conviction. It was proved as a fact that he had no intention to defraud the railway company:—*Held*, that the conviction must be quashed, for, without deciding whether the bye-law under which the conviction was had did or did not make proof of the absence of fraudulent intention an exemption from the penalty as well as the excess fare, it was,

if it made the fraudulent intention immaterial in the case of the penalty, repugnant to the statute.[214]

All Tickets must be shown or delivered up upon demand to any railway servant duly authorised to examine or collect tickets, and any passenger having a ticket and not showing or delivering up the same when so required is, under Section 31 of the Railway Act, liable to pay the fare of the class in which he is found travelling, from the place whence the train originally started, unless he can prove that he has travelled a less distance only. This section is for the protection of the railway administration, as in the absence of the ticket there are no means of knowing where the passenger got into the train, and the onus of proof is therefore thrown upon the latter. The penalty imposed seems however unreasonable, as it is unequal in amount in different cases, although the same offence be committed in each case. For instance, the penalty on a man who got in at one of the last stations might be ten times what it would be in the case of a man who got in at one of the earlier stations, and for an act of the very same character.

In the case of *Saunders* v. *The South Eastern Railway Company*, the plaintiff had been for many years a season ticket-holder on the defendants' railway, and one day, being in the train, he was asked to show his ticket but declined to do so, upon which he was

summoned and fined by a magistrate under the company's bye-laws the amount of the fare from the station from which the train originally started. The plaintiff appealed to the High Court, and in dismissing the appeal Lord Chief Justice Cockburn remarked that there could be no doubt that season ticket-holders were bound to produce their tickets when required, and that it was reasonable that a penalty should be imposed on a refusal, but the penalty for the same offence should be equal.[215]

Power of Arrest without Warrant.—Any railway servant or police officer, or any person whom such railway servant or police officer may call to his aid, is invested by Sections 48 and 49 of the Railway Act with power to arrest and detain, without warrant or written authority, any person who has committed any offence punishable under the Act, if there is reason to believe that he will abscond or his name and address are unknown, and he refuses to give his name and address, or there is reason to believe that the name or address given by him is incorrect.

But this power of arrest without a warrant is not conferred upon, nor can it be exercised by, every person employed by a railway administration indiscriminately. The railway servant making the arrest must be acting within the scope of his duty at the time, and have express directions or an implied authority from the railway administration to do the act.

In an action for false imprisonment, the questions were, whether there was evidence that the railway servant who made the arrest was the servant of the defendant company, and also whether they had authorised him to make the arrest, or afterwards ratified his act. The facts were that the plaintiff, having seen an advertisement of an excursion train from Monk's Ferry to Bangor, inquired of the clerk of the Monk's Ferry station as to the return of the train, and was told by him that he could return by the 7 o'clock train from Bangor, which the plaintiff accordingly did. At Chester the train was stopped, and a railway servant took the plaintiff's ticket and demanded 2*s.* 6*d.* excess fare, because he ought not to have gone by that train. Payment was refused, and the railway servant and the superintendent took the plaintiff into custody. The Court, without deciding the question whether there was evidence that the servant who made the arrest was the servant of the defendants, held that as there was no proof of the defendants having the power of arresting the plaintiff there was no evidence of their having expressly or impliedly authorised or ratified the arrest, and that therefore they were not liable for the tortious act of the person who made the arrest. *Pollock*, C.B., in delivering judgment said, 'The principle is, that the master is not liable for the tortious act of the servant unless he has either given him express directions or an implied authority to do the act.' And *Parke*, B.,

observed that the arrest in this case was made by a third person, and therefore the plaintiff was bound to show an authority either express or implied given by the defendants, or a ratification by them of the act done.' [216]

CHAPTER VIII.

MISCELLANEOUS.

Reserved Accommodation.—When reserved accommodation in any conveyance has been engaged, whether the fare has been wholly or partly paid or not, the carrier has no right to separate the party unless it exceeds the number allowed by law to be carried. Thus, where four ladies wishing to travel together reserved the whole of the inside of a coach, it was held that the coach proprietor had no right to separate them, and that having given his assent by promising to reserve the accommodation required, the contract was not fulfilled by furnishing a double-bodied coach, and tendering three inside places in one division and one in the other.[217]

Undue Preference—Season Tickets.—In issuing annual or season tickets at reduced fares between certain stations a railway administration is at liberty to consult its own interests. Upon an application for an injunction against a railway company to compel them to issue season tickets between Colchester and London

on the same terms as they issued them between Harwich and London, on the ground suggested that the granting of the latter (the distance being considerably greater) was an undue and unreasonable preference of the inhabitants of Harwich over those of Colchester, the Court held that it was optional to the company to issue such tickets or not, and refused the application.[218]

Regulations, Rules, Custom.—Every railway administration is empowered under Section 8 of the Railway Act to make general rules:—

(1) For regulating the mode in which, and the speed at which, carriages and waggons used on the railway are to be moved or propelled:—

(2) For regulating the maximum number of passengers which each carriage and compartment may carry, and the mode in which such number shall be denoted thereon:—

(3) For regulating the provision to be made for the accommodation and convenience of passengers:—

(4) For declaring what shall be deemed to be, for the purposes of the Act, dangerous goods:—and

(5) Generally for regulating the travelling upon, and the use, working, and management of the railway; and may, from time to time, alter any such rules.

The fact that the rules and regulations of a railway administration have been wholly or partly relaxed in the past is no reason for a court to interfere to restrain them from being strictly enforced in the future.[219]

Trespassers.—Any person who unlawfully enters upon a railway is liable to a fine which may extend to twenty rupees, and if any person so entering refuses to leave such railway on being requested to do so by any railway servant, or by any other person on behalf of the railway administration, he is liable to a penalty of fifty rupees, and may be immediately removed from such railway by the railway servants or such other person aforesaid.

A person is said to be lawfully on the premises of a railway if he enters upon them on the invitation, or with the licence or permission, expressed or implied, of the railway administration or any of its servants duly authorised in that behalf. A railway administration, in virtue of its right of property, as also under the power given it by the Railway Act, may refuse admission to its platforms and buildings to any person not being a passenger, or having business to transact in connection, with the railway, whom it may think fit to exclude.

Carriages—Omnibuses—Undue Preference.—By Section 47 of the Act every driver or conductor of an omnibus, carriage, or other vehicle shall, while in or upon any station-yard or other premises forming part of a railway, obey the reasonable directions of any railway servants duly authorised in this behalf; and every person offending against this section shall be punished with fine which may extend to twenty rupees.

A railway company made arrangements at one of their stations with A., an omnibus proprietor, to provide

omnibus accommodation for passengers, and allowed him the exclusive privilege of driving his vehicles into the station-yard for the purpose of taking up and setting down passengers:—*Held*, that, in the absence of special circumstances showing it to be reasonable, the granting of such an exclusive privilege to one proprietor and refusing it to another was an undue preference.[220]

But, *contra*, in a second case in which an injunction was prayed to remove a restriction on the applicants plying for hire within the station-yard of the railway company and refused, *Bovill*, C.J., observed that it was necessary for the convenience of the public that railway companies should make arrangements for the attendance of a sufficient number of carriages for the conveyance of passengers; that if every one indiscriminately might bring his carriage into the station-yard it would give rise to great confusion and obstruction; and in all such cases of alleged undue preference it must be clearly shown that the course complained of occasioned inconvenience to the public, distinguishing *Marriott's* case quoted above.[221]

A cab or omnibus proprietor cannot maintain an action against a railway company for refusing to allow him to drive his empty vehicle into the station-yard.[222]

Placarding convicted Persons.—It has been repeatedly ruled by the superior courts of England that a carrier by railway is justified in posting a 'caution' notice on any part of his premises to the effect that a

certain person therein named has been convicted of an offence punishable under the Railway Act or any other criminal law actually in force; provided that the offence has been committed against the carrier by whom the notice is issued, and that the notice contains a true and concise statement of the offence and sentence without addition or comment.

In an action against a railway company for having published a libel on the plaintiff by printing and posting up at their railway stations a notice as follows: 'Caution. A. B. of C. D. was charged at the F. sessions on the ——— with having travelled in a first-class carriage from G. to H. on the ——— without having first paid his fare, and fined 1*l.* with costs,' it was pleaded that the plaintiff had been charged and convicted of the offence in penalty and costs, and had therefore purged his offence:—*Held*, that the facts afforded a justification of the libel, travelling without having paid the proper fare being an offence under the Railway Act.[223]

A railway company published a 'caution notice' to the public stating that the plaintiff had been convicted of an offence against their bye-laws, and fined with the alternative of *three* weeks' imprisonment. The period of alternative imprisonment as a fact was a *fortnight* only. Subsequently the conviction was quashed on appeal. In an action for libel it was held that the misstatement as to the period of alternative punishment did not necessarily render it libellous. *Per Cockburn*, C.J.:

'Here the libel was published before the conviction was quashed, and while it was still in full force. It would be very different if the company were to publish it after the conviction had been set aside. As it was, however, the placard appeared to be in substance true. If, for instance, the placard had stated that the plaintiff had been sentenced to two years' imprisonment, so as to convey the impression that his offence had been much more serious than it was, the libel possibly could not have been supported. The variance between two weeks and three, especially as a mere alternative punishment, was quite immaterial, and the placard was not so far untrue as to be libellous. The judgment of the Court must therefore be for the company.'[224]

Where, in another case, the 'caution notice' stated in large type that the plaintiff had been sentenced to *hard* labour, when the sentence was *simple* imprisonment and fine, the Court held that the notice *was* libellous.[225]

Malicious Prosecution.—A railway administration is not liable in an action for malicious prosecution, in respect to a criminal proceeding instituted by one of its servants, without its knowledge or direction.[226]

Rules of the Road in Driving.—There are three customary rules for driving on a public road: (1) that in meeting each party shall bear to his left; (2) that in passing the *passer* shall do so on the right hand; and (3) that in crossing, the driver shall bear to the left and pass behind the other carriage. But these

rules are not inflexible, if by departing from them an accident can be avoided, for such a law or usage is no criterion of negligence. Where, in an action for negligence in damaging the plaintiff's carriage, a verdict had been given for the defendant, and a motion was made for a new trial on the ground that at the time of the accident the defendant's carriage was on the wrong side of the road and attempted to pass on the near instead of the off side, the Court refused the rule, saying 'that whatever might be the law of the road, it was not to be considered as inflexible and imperatively governing a case of this description. In the crowded streets of large towns, situations and circumstances might frequently arise where a deviation from what is called the rule of the road would not only be justifiable but absolutely necessary. The question in this case was a question of negligence. Of this the jury were the best judges, and, independently of the law of the road, it was their province to determine whether the accident arose from the negligence of the defendant's servants. So it appears to be no justification that the defendant was on the wrong side, if there was sufficient room for the plaintiff's vehicle to pass without inconvenience.'[227]

Speed of Vehicles.—There is no recognised limit to the speed at which trains may be run In Europe the fastest trains generally travel at a speed of from fifty to sixty miles an hour, exclusive of stoppages on the road; but in India trains are rarely run at a greater

speed than thirty miles an hour. The average speed at which a stage-coach or hackney carriage should run is six miles an hour, and this may be accepted as a mean between slow and fast driving. A carriage which travels at a rate less than four miles an hour is not considered a stage carriage in England, and need not be licensed.[228]

Right of Pedestrians to use of Road.—A man has a right to walk in the road if he pleases. It is a way for foot passengers as well as for carriages. Thus it is the duty of a driver of a dâk-carriage or coach to use such reasonable care and caution in passing along a road that he do not injure a foot passenger who is walking in the carriage way, and who, even if he be infirm, has a right to walk there. So also a person has a right to cross the road, and those driving along it are bound to take reasonable care, and avoid driving against him; and even if the reins break and the pedestrian be injured, it will be no defence, for it is the driver's duty to have proper tackle.[229]

Injury to Stranger.—A carrier is liable for negligence whereby a third person, not a passenger, is injured, such as a person coming on to the carrier's premises to meet a passenger, or to see a friend off by train or coach. A railway porter was standing in broad daylight upon a plank thrown across from parapet to parapet of a footbridge connecting the two platforms at a station, cleaning a lamp, when the plaintiff, accompanying her

daughter to a train, in crossing the bridge struck her head against the plank and was injured:—*Held*, that negligence had been shown by the defendants, and judgment was entered for the plaintiff.[230]

Communication between Guard and Driver.—On all passenger trains means of communication between the guard and driver of the train must be provided. On railways in India the mode of communication is generally by means of a cord which is attached to a bell or whistle on the engine, and thence conducted through a series of spiral hooks alongside and below the doors of the carriages to the break-van, where it is fastened to a ratchet-wheel, so arranged that the guard can at any time by tightening the cord sound the alarm bell or whistle, and attract the driver's attention. In all cases when the bell or whistle is sounded once or twice, it is the duty of the driver to look back for a signal from the guard; if the signal is 'caution,' he must slacken speed; if danger, he must stop the train. In the event of the bell or whistle being rung three or four times in succession, the driver must stop the train without delay, and ascertain from the guard what is wrong.[231]

Communication by Footboard.—Up to the time of this work going to press no rule had been passed by the Government of India rendering it obligatory upon a railway administration to provide footboards to carriages and other vehicles on passenger trains, so as to afford

means of passing from one end of the train to the other while it is in motion. Such footboards are not considered necessary in Europe for the safety of the train or the passengers travelling therein, and are not now provided on Continental railways. In England their use is objected to on acount of the number of guards who have been killed while passing along them; and in India fatal accidents to guards, soldiers, and others who have got out of the van or carriages on to the footboard have not been unfrequent.

In giving evidence before the House of Lords on the Railway Guards and Passengers' Communication Bill, Mr. James Allport, general traffic manager of the Midland Railway Company, stated in reference to footboards: 'I have letters from almost all the managers and directors of railways upon the Continent, and they uniformly condemn the practice of guards going along the footboards to communicate with the passengers. On many of the lines, particularly the fast lines, for instance, if you travel between Paris and Marseilles, which is the fastest line that they have in France, the practice is discontinued. If the guard does it, it is not in accordance with his instructions. You will find that in this country the guards frequently do it, but they do it at their own risk. There is no railway manager and no board of directors, I am quite sure, who would venture to make it a written rule that guards should walk along these footboards. I say deliberately that nothing should

induce me to give such instructions to guards or to put such a rule in our books, because I know the result would be fatal to a great many guards.'

That Mr. Allport was right in the opinion he expressed there can be scarcely any question. The fact that footboards afford an easy means for a courageous and steady guard to give immediate assistance to a passenger in distress cannot be denied, but this advantage is more than counterbalanced by the facilities they offer to thieves and other wrong-doers of passing from carriage to carriage in prosecution of their nefarious designs, to say nothing of the grave risk incurred by a guard who, impelled by what he believes to be a sense of duty, or actuated by a feeling of over-confidence, subjects himself to the danger of walking perhaps the whole length of a train going at high speed, along a number of narrow disconnected footboards. No man is under a legal obligation to risk his own life to save that of another, and on this principle, if on no other, no action could be maintained against a railway administration for neglecting to provide footboards to carriages or any other means of communication of the kind, the use of which must necessarily expose the person using them to deadly peril.

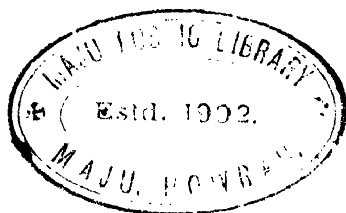
Property found in Trains.—A carrier is entitled, with certain exceptions, to the custody of all lost or unclaimed property which may be found by himself or his servants in or upon his carriages, conveyances, or

premises, and his title in such property is good against all other than the actual owner: the exceptions to this rule are in the case of hackney coaches, omnibuses, cabs, ferry-boats, and such licensed public conveyances the proprietors of which are generally bound by the Act under which they are licensed to make over any property found in their conveyances to the police or some other specified public authority.

A person who finds goods belonging to another, and takes them into his custody, is, under Section 71 of the Contract Act of 1872, subject to the same responsibility as a bailee, and is bound to take as much care of the goods found as a man of ordinary prudence would take of his own goods of the same bulk, quality, and value as the goods found.[232] But in order to invest the carrier with a right of property in goods found upon his premises, it would seem to be necessary that he should have either constructive or actual possession of them. In a case in which the Great Western Railway Company were plaintiffs, it appeared that the defendant found a purse of money in a railway carriage in which he was travelling on the plaintiffs' line of railway. The plaintiffs claimed the custody of the purse to hold it for the owner, but the defendant refused to surrender it, and asserted that his right as finder was superior to theirs and indefeasible against all other than the actual owner, whereupon the company instituted an action for the value of the property, which they entered as of the

nominal value of *50l.* The court held that although the purse was found in the plaintiffs' carriage, it was never under the protection of the company, and gave judgment for the defendant.[233]

Dying Declarations as Evidence.—The dying declaration of the deceased, as to the cause of the accident in which he was injured, is not evidence in an action for negligence. Such a declaration can only be considered as an expression of opinion.[234]



PART III.

CARRIERS OF GOODS BY LAND OR INLAND NAVIGATION.

CHAPTER IX.

OF COMMON CARRIERS.

Who are Common Carriers.—All persons other than the Government engaged in the business of transporting for hire property from place to place, for all persons indiscriminately, are common carriers.[235]

Masters and owners of ships and river steamers, owners of tramroads constructed under Act xxii. of 1863, proprietors of river flats, stage-coaches and stage-waggons, canal companies, bargemen, ferrymen, wharfingers, lightermen, and hoymen, are all, under various rules of law, classified as common carriers.[236]

River Steamers and Flats.—The master or owner of a river steamer is a common carrier if the steamer is employed for the carriage of goods between specified places for all persons without distinction. Where the

owner of the steamer usually employs it on his own account, or if he lets the tonnage with a small exception to a single person, and then for the accommodation of a particular individual he takes goods on board for freight (not receiving them for the public in general), he will be deemed a mere private and not a common carrier, inasmuch as he does not hold himself out as engaged in the public business or employment of a carrier.[237]

Owners of Tramroads constructed under the provisions of Act xxii. of 1863 are included in the Carriers' Act, but their liability for the loss of, or damage to, property delivered to them to be carried is expressly limited by Section 7 of that Act, and they are only responsible when such loss or damage has been caused by negligence, or a criminal act on their part or on that of their agents or servants.

Proprietors of Stage-coaches, who hold themselves out as carriers of goods as well as of passengers, are common carriers, and their liability as such extends to the luggage of passengers as well as to the goods of strangers.[238] The owner of a stage-coach who professes to carry goods is a common carrier, though the carriage of goods be not his sole or principal business.[239]

The proprietor of a stage-waggon who brought goods to London on his own account, and on his return to the country regularly took such goods as he could get to carry back with him into the country, for a reasonable hire, was held to be a common carrier.[240] But the practice of a

coachman to carry parcels for hire for his own particular advantage will not render the owner of the stage-coach liable as a common carrier.[241]

Canal Companies, Bargemen, Boatmen, and Ferrymen who ply on canals or rivers, the coast, or in harbours, are common carriers if they publicly undertake the conveyance of property for hire for all persons who may choose to employ them. But ferrymen and boatmen who profess to carry passengers only, though they occasionally carry goods, are not common carriers.[242]

Wharfingers, Lightermen, and Hoymen may be common carriers or not, according to circumstances. A carrier of this class who undertakes to carry goods from his wharf in his own lighters or hoys is liable as a common carrier if the goods are lost or destroyed *while in transit.* In an action against a wharfinger and lighterman, for not safely keeping goods entrusted to him in London, to be shipped to Newcastle, it appeared that the goods had been accidentally destroyed by fire while on the defendant's premises, and the question was whether the defendant, whose duty it was to convey the goods from the wharf in his own lighter to the vessel in the river, was liable for the loss. Lord *Ellenborough* is reported to have said in the course of the trial that the liability of a wharfinger while he has possession of the goods was the same as that of a common carrier. It was not, however, shown in this

case at what time the goods were destroyed by fire; whether in the warehouse, or on the wharf of the defendant in their progress to be put on board the lighter. If the goods were destroyed while in the warehouse, the defendant, as an ordinary bailee for hire, was not responsible, as the fire was accidental; but if they were on the wharf in course of transit to the lighter, he was liable as a common carrier, for the transportation of the goods had then commenced.[243]

Town Carmen and Carters.—It has been ruled in England that town carmen and carters, such as owners of bullock-hackeries who ply for hire at railway stations and river ghauts, who let out their carts by the day, hour, or job, but do not carry mixed consignments at a fixed rate from one specified *terminus* to another, are not common carriers.[244] But this ruling has been rejected by the Courts of the United States of America, where it has been held that carters, truckmen, and teamsters who undertake to carry goods as a common employment from one part of the town to another are subject to the duties and liabilities of common carriers.

In India it is not necessary that a carrier should ply between fixed *termini* to constitute him a common carrier, and a town carman who engages in the business of transporting property for hire from place to place is undoubtedly a common carrier within the meaning of the Carriers' Act.

Who are not Common Carriers.—No person is a

common carrier, as to the liability to be imposed, who does not come within the definition contained in Section 2 of the Carriers' Act.

Carriers by Railway are not common carriers in British India, but are bailees for hire. Section 2 of the Railway Act of 1879 expressly declares that nothing contained in the Carriers' Act shall apply to carriers by railway, and this exception extends to the owners of all vessels, rafts, flats, &c., used for the purpose of carrying on the traffic of a railway.[245]

The Government of India, or the Local Government, in relation to its carrying business as the proprietor of State railways, bullock-trains, post office, mail carts, &c., is not a common carrier, being specially excepted in the definition of that term given in the Carriers' Act. It is a bailee for hire with respect to the goods which it undertakes to carry.[246]

Warehousemen and Booking-office Keepers are not in general liable as common carriers, their contract being usually to deliver to the carrier, and not to the consignee, and their liability ceasing on a delivery to the carrier.[247]

Forwarding Agents are under the same legal responsibilities as warehousemen, and are bound to use ordinary skill, care, and diligence, but are not liable as common carriers unless they combine the business of carrier with that of their agency.[248]

Owners of Steam-tugs and Towing-boats are not

subject to the Carriers' Act as common carriers except when they publicly profess to carry goods as a business.[249]

Proprietors of Dâk-carriages, Hackney Coaches, and Cabs are not, as we have seen in considering the liabilities of carriers of luggage, common carriers, but are responsible as bailees for hire for any loss which may arise from the negligence or default of themselves or their servants.

CHAPTER X.

THE DUTIES AND RIGHTS OF PUBLIC CARRIERS OF GOODS.

Duty to receive and carry.—Public or common carriers of goods by the custom of the realm, that is, by the common law, are bound to receive, unless they have reasonable excuse, and carry the goods of all persons alike for a reasonable hire or reward, without subjecting the person tendering the goods to any unjust or unusual conditions;[250] to take good care of the goods on their passage, and to deliver them safely and within a reasonable time in the same condition as when they were received.[251]

It is obligatory upon a public carrier—whether a common carrier, a carrier by railway, or a carrier who is a bailee for hire, as the Government in respect to its bullock-trains, &c., to convey the goods of any person who tenders or offers to pay the hire, unless his carriage be already full, or the risk sought to be forced upon him be unusual and extraordinary; or unless the goods be of a description which he cannot convey, or which he is not in the habit of conveying and does not profess

to carry.[252] It is also his duty to carry the goods intrusted to him without any unnecessary deviation, and in the usual and customary course.[253] He is not, however, bound to carry by the shortest route, but only by that by which he usually carries such goods, and by which he professes to go.[254]

A Carrier may refuse to receive Goods when he has no convenient means to carry them with safety or security, as in the case of articles of great value or of large bulk;[255] or if the goods are offered to him at an unreasonable time;[256] or if the road or railway is obstructed, as by the breaking down of bridges, floods, &c.; nor is he bound to receive goods unless he is ready to engage in their transit.[257] A refusal to carry has been held to be reasonable when it appeared that it was a time of public commotion, and the goods which the carrier was desired to carry were the objects of public fury, and their carriage would be attended with extraordinary risk, against which the carrier's precaution would be inadequate to secure him.[258]

Equality—Undue Preference.—A carrier by railway and some canal companies are bound by statute, *according to their respective powers*, to afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such carriers, and for the return of carriages, trucks, boats, and other vehicles, and no such carrier may make or

give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever; nor may any such carrier subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.[259] A railway administration or a canal company in India acting as carriers, and so bound by statute to deal equally with all persons, cannot make a regulation for the conveyance of goods which in practice affects one individual or one company only.[260]

A carrier may profess to carry light goods only, and then cannot be compelled to carry heavy goods; or he may say that he will carry from Howrah to Allahabad and not from the intermediate stations, and then he cannot be made to carry goods from those places which he has excepted; but as soon as he has publicly professed to carry in any particular manner or between specified places, and so long as he does so, he is bound to carry the goods of all persons, if he has room in his conveyance and the price of the carriage be paid or tendered when the goods are offered.

Thus, although a carrier by railway carries coal and other goods from one part of his line to the other, and carries goods of another kind from certain intermediate stations, he is not bound to carry coal from those intermediate stations, unless he has publicly pro-

fessed to do so; and, even if he has so professed, he can only be compelled to do so provided that there are means and conveniences at such intermediate stations for that particular kind of traffic. Where coal or other minerals are only carried under special contracts, it is not obligatory upon a carrier to receive all that may be tendered.

If a carrier make a rule or custom of carrying a particular class of goods by a certain train only, he cannot be compelled to take such goods by any other train.[261]

It is competent to a railway administration to enter into special agreements whereby advantages may be secured to individuals in the carriage of goods upon the railway, where it is made clearly to appear that, in entering into such agreements, the administration has only the interests of the proprietors and the legitimate increase of the profits of the railway in view, and the consideration given to the administration in return for the advantages afforded by it be adequate, and the administration is willing to afford the same facilities to all others upon the same terms. A carrier by railway may carry at a lower rate in consideration of a guarantee of large quantities and full train loads of goods at regular periods, provided the real object of the carrier be to obtain thereby a greater remunerative profit, by the diminished cost of carriage, although the effect may be to exclude from the lower rate those persons who cannot give such a guarantee.[262]

As an illustration, where a rebate allowed to one customer is only equal in value to the service of which he relieves a railway administration, there is no undue preference; but where the rebate is clearly in excess of the value of the service rendered it is an undue preference.[263]

The plaintiff carried on business as a brewer in the town of B., and employed defendants to convey goods for him by their railway. Plaintiff, whose premises were not connected by sidings with any railway, was charged by defendants a station to station rate from A. to B. station (which included, *inter alia*, the necessary station accommodation), and one shilling per ton for cartage. Three other firms at B. had premises connected with M., a rival line, by sidings, from which all goods forwarded or received were loaded or unloaded. The cost of cartage was thus saved, in addition to which they were allowed a rebate of ninepence per ton, a sum which fairly represented the value of the station accommodation and other services which were not required to be performed by the M. company. The defendants, solely with a view of attracting a share of the traffic of the three firms from the M. railway, and without any intention of prejudicing the plaintiff, carted goods for them gratuitously, and allowed also a rebate of ninepence per ton on the station to station rate. The result was that the plaintiff had to pay 1*s.* 9*d.* per ton more than the three firms, for goods carried under the

same circumstances of risk and cost:—*Held*, that the gratuitous cartage and the allowance of the rebate granted by defendants to the three firms, but not granted to plaintiff, though made *bonâ fide* for the purpose of attracting traffic, and though such traffic realised a profit notwithstanding such allowance or rebate, amounted to an undue preference.[264]

A carrier by railway has no right to make an increased charge for packed parcels in order to prevent other carriers from entering into competition with him, and there is no difference between a packed parcel sent to one individual containing parcels belonging to a variety of people, and parcels sent to one individual all the contents being his own.

In the case of *Baxendale* v. *The London and South Western Railway Company*, it appeared that the defendants charged a tonnage rate upon goods over 1 cwt. and a higher rate for packages of goods under that weight. Where several packages, each under 1 cwt., were delivered to the defendants by one consignor, to be carried as a single consignment to one consignee, the defendants charged the tonnage rate upon the aggregate weight. The plaintiff, who was a common carrier, sent by the defendants' railway large consignments of goods directed to himself as consignee, each consignment consisting of several packages; the defendants charged for each package contained in each consignment separately according to the weight of the package

at the higher rate :—*Held*, that this was an undue preference, and that the plaintiff was entitled to recover the increased charges he had paid.[265]

But, in another suit between the same parties in which undue preference was alleged, it was held that there had been none shown by the defendant company. The facts were as follows: The plaintiff carried goods from London to the Isle of Wight, an island beyond Southampton, and used the defendants' railway for their conveyance as far as Southampton. The defendants, whose railway does not extend beyond Southampton, also carried goods from London to the Isle of Wight, and charged the plaintiff for the carriage of the goods from London to Southampton a higher rate in proportion than, under a contract to carry to the Isle of Wight, they charged their customers between London and Southampton, and for the carriage between the two latter places they charged the plaintiff and the rest of the public alike. The Court decided that there was no irregularity of charge.[266]

A carrier by railway has no right to carry for one person and not for another. Where it appeared that the defendants held themselves out as carriers from London to Scotland of packed parcels, and that their practice was so to carry in every case but for the plaintiff; but that, in respect to his parcels, they gave him notice that they would not carry them beyond Rugby, though for all the rest of the world they

carried to Scotland; it was held that they were liable to an action at the suit of the plaintiff for refusing to carry his parcels, as they were bound to administer the same rules to all, and if they carried packages to Scotland for others they must do so for the plaintiff.[267]

Under a special clause in a Railway Act the directors were empowered to make a minimum charge for conveyance of coal along their line, including tolls for the use of waggons, &c., 'and every expense incidental to such conveyance, except a reasonable sum for loading, covering, and unloading of goods, and delivery and collection, and any other services incidental to the business of a carrier.' Under another clause, the directors were empowered to make increased charges by agreement in respect of any other special service performed by them. By a third clause, it was enacted that the company should 'provide sufficient locomotive power when and as the same should be required, and as soon as an adequate and sufficient load should be in readiness, to convey all merchandise,' &c. Under the Act, the company sought to impose additional charges on a colliery owner, in respect of taking his waggons to and from a siding belonging to the colliery owner. It appeared that whatever peculiar difficulty was experienced in this work arose from the position of the points joining the siding to the company's line. The company also sought to impose an additional charge in respect of their allowing the coal of the colliery owner

to be left on ground adjoining their line:—*Held*, that neither of these were 'services incidental to the business of a carrier' within the meaning of the Act. Also, that the second-mentioned charge, being for an advantage obtained by the colliery owner, might have been made the subject of agreement.

The same company had also refused to convey the coal of the colliery owner, unless he had ready fifteen waggons containing a minimum load of forty tons each, while they conveyed the coal of others in smaller quantities:—*Held*, that this was unreasonable, and not warranted by the Act. Also, that damages in respect of loss of custom to the colliery owner occasioned by the restriction were not too remote.[268]

In England it has been ruled that a railway company are debarred under the Railway and Canal Act of 1854 from showing any preference to themselves in their traffic arrangements. Where a railway company fixed an hour in the evening as the latest time at which goods were to be received at their station for despatch the same night, but although the goods brought by A. (a carrier) were never allowed to enter the station after such prescribed time, the railway company constantly admitted their own vans from their own receiving houses an hour or two later, and forwarded the goods they brought by trains of the same night, it was held that A. was entitled to an injunction under the Railway and Canal Traffic Act of 1854, to restrain the railway

company from continuing such undue preference to themselves.[269]

Declaration of Contents of Packages and Parcels sent by railway must be made when required. The owner or person having the care of any property which has been carried upon any railway, or is brought into any station or warehouse for the purpose of being carried upon a railway, must, on demand by any railway servant appointed in this behalf by the railway administration, deliver to him an exact account in writing, signed by such owner or person, of the quantity and description of such property.[270]

But where the obligation is not imposed by statute the sender need not declare the contents of the packages in all cases, nor has the carrier any absolute right to insist on being informed, unless there is reasonable ground for believing that a package contains excepted or dangerous articles, in which case it is his duty to make inquiry if he wishes to have a reward proportionate to their value and his risk, or to know whether they are goods of a kind or quality for which he has a sufficiently secure conveyance.[271]

Delivery to Carrier.—A delivery to a wharfinger or a carrier of goods sold has the same legal effect as a delivery to the buyer, and such delivery by operation of law at once transfers the property in the goods to the consignee, subject only to the consignor's right of *stoppage in transitu.* But in order to render the

vendee liable to the vendor for the price of goods which do not reach him, the delivery must be so made as to enable him to hold the wharfinger or carrier responsible for the safe custody or delivery of the goods.

As an illustration, B. at Agra orders of A. who lives at Calcutta three casks of oil, to be sent to him by the East Indian Railway. A. takes three casks of oil, directed to B., to the railway station, and leaves them there without conforming to the rules which must be complied with in order to render the railway administration responsible for their safety. The goods do not reach B. There has not been a sufficient delivery to the carrier to charge B. in a suit for the price, and the railway administration cannot be held responsible by either A. or B.[272]

The responsibility of a carrier does not commence until there has been a complete delivery to him; and if, according to the usage of the business, it be a sufficient delivery to leave the goods upon a dock, or wharf, or in a shed or warehouse, yet this must be accompanied with *express notice* to the carrier.[273] When the responsibility has begun, it continues until there has been a due and proper delivery by the carrier, or he has discharged himself of the custody of the goods as a carrier.[274]

In all cases a person delivering goods to a carrier to be conveyed by him is bound to procure them to be booked in accordance with the carrier's rules, or to deliver

them to the carrier himself, or some responsible agent or servant authorised to receive and book them on behalf of the carrier. Leaving goods at a railway station or at an office from which a stage-coach or a stage-waggon starts without the sender seeing that they are properly booked, and, as a general rule, taking a receipt from the carrier for them, is not a good and binding delivery.

Where goods were delivered to a person standing at a warehouse door, in an inn-yard, who was employed in loading another waggon at the time, but the consignor did not know the name of such person, it was held that there had been no sufficient delivery to charge the waggoner, although the consignor told the person whom he saw by what waggon the goods were to go, and asked the owner's name.[275] And, in another case, where a quantity of goods were left on a wharf piled up among other goods directed to the consignee, but no receipt was given for them, nor any entry respecting them made in the carrier's books, and no person belonging to the wharf was fixed with a privity of their being left there, it was held there was no sufficient delivery.[276]

Railway officials, warehouse receivers, porters, and drivers or conductors of stage-coaches, being in general the carrier's servants, nominated by him, and therefore his legal agents, a delivery to any one of such persons is a sufficient delivery to charge the master.[277] But where a railway administration gives public notice that it will not, or the usage of its business is not, to receive

goods to carry, unless receipts for the same are given signed by their clerks or by other persons authorised in that behalf, it could not be held liable for the loss of goods delivered to its servants by persons acquainted with such notice or usage who had neglected to obtain such receipts.[278]

But a delivery need not necessarily be made to the carrier at his own place of business or regular booking office, as if a message be left at the booking office of a carrier from A. to B., for his van to call for the plaintiff's luggage at C., a place *en route*, for the purpose of its being carried to B., and the carrier's servant and van go to C., and the plaintiff's luggage be there put into the van, it is a delivery to the carrier, and he is as much liable for a loss as if the luggage had been taken to his regular booking-office.[279]

It is not necessary to constitute a delivery, that the goods should be entered upon any way-bill, invoice, or freight list, this being a mere *ex parte* document, and is not, like a bill of lading or a railway receipt, evidence of a contract between the parties. Nor is it necessary that the goods should be left at the usual place of delivery at or before the hour appointed for receiving them, in order that they may be forwarded on the same day, if they are *received* at a later hour by the carrier's servants under a special contract that they shall be forwarded the same day.[280]

Of course it is no delivery to a carrier or acceptance

by him if the goods are placed in his conveyance without his knowledge or consent.[281]

Consignor Travelling in Charge of Goods.—If the owner of the goods refuse to place confidence in the carrier or specially undertake to watch over the safety of the goods either while they are in transit or after they have been warehoused by the carrier, no duty or liability will attach to the carrier, as the owner's action negatives a bailment to the former.

The East Indian Company v. *Pullen* was an action against the defendant as a common carrier, on an undertaking to carry for hire, on the River Thames, from the ship to the company's warehouse. It appeared in evidence, that the defendant was a common lighterman, and that it was the usage of the company, on the unshipping of their goods, to place an officer called a guardian in the lighter, who, as soon as the lading was taken in, put the company's lock on the hatches, and went with the goods to see them safely delivered at the warehouse; that such practice had been adhered to in this case, and that part of the goods were lost. The Chief Justice was of opinion this differed from the common case, there not being any trust in the defendant, as the goods were not to be considered as having been delivered to him or in his possession, but in the possession of the company's servant, who had hired the lighter to use himself, and the plaintiffs were nonsuited.[282]

A carrier may, however, under certain circumstances be liable for the goods, as upon a special contract for the safe conveyance of the goods, and therefore where A. sent goods to B., who said, 'I will warrant they shall go safe,' it was held that this amounted to a warranty, and B. was liable for a damage sustained by the goods, notwithstanding A. sent one of his own servants in B.'s cart to look after them.[283]

Goods must be properly and securely packed when delivered to the carrier; and if any injury arise to them during the journey, from their being badly packed, the carrier cannot be held liable. But the carrier cannot absolve himself from liability, where he has the means of observing the risk he runs in accepting goods in the state in which they are presented to him. A cask of brandy had been delivered to a carrier which leaked during the journey, and it appeared he had been informed of the circumstance, but made no examination of the cask nor took steps to prevent the leakage. An attempt was made to show that the cask was in a damaged state when put into the defendant's waggon; which attempt, however, failed, and a verdict was given for the plaintiff.[284]

In an action against a common carrier for the loss of a greyhound, it was contended by the defendant that the dog was not properly secured when delivered to him, and that a collar and chain instead of rope should have been provided to have insured the safety of the animal,

but it was held that the defendant was responsible. In point of law, the defendant had acknowledged a proper delivery of the dog to him by giving a receipt. The case was not like that of goods *imperfectly packed*, since there the defect was not visible; but in this case the defendant had the means of seeing that the dog was insufficiently secured.[285]

Merchandise as Luggage.—If a passenger by railway carry merchandise packed up with his personal luggage in contravention of the bye-laws or usage of, and without notice to the railway administration, the latter will not be responsible for its value if it be lost during the journey, because there has been no delivery of it as merchandise to the administration, and, *primâ facie*, the contract is only to carry the passenger and his ordinary luggage—that is, such things as may fairly be carried by the passenger for his personal use or convenience, according to the habits and wants of the particular class to which he belongs, either with reference to the immediate necessities, or to the ultimate purpose of the journey.[286] Where the plaintiff received a parcel from G. to book for London at the office of the defendants, who were common carriers; and instead of obeying his instructions, he put the parcel into his bag intending to take it to London as part of his personal luggage; it was held that he could not recover against them for the loss of such parcel.[287]

Dangerous Goods.—Any person who delivers or

tenders for carriage upon any railway, any dangerous goods without giving notice of their nature to a railway servant, or in the case of goods delivered or tendered for carriage without distinctly marking their nature on the outside of the package containing the same, commits an offence under the Railway Act, for which he is liable to a penalty of 200 Rs. Any railway servant may refuse to carry any package which he suspects to contain dangerous goods, and may require it to be opened to ascertain the fact.[288] A carrier, who is not a carrier by railway, is also justified at common law in refusing to carry any package which he knows or has reason to suspect contains dangerous goods, unless the contents of such package have been declared by the sender, and the carrier has means at his disposal for its safe transport.

Delivery by Carrier.—The liability of a carrier commences on the delivery to and acceptance by him of the goods to be carried, and continues until he has divested himself of the character of carrier, and the delivery of the goods is either completed or waived by the owner. As soon as the goods have arrived at their proper destination, and no further duty remains to be peformed by the carrier, his liability as such ceases.[289]

The duty of a common carrier is safely and securely to convey and deliver. And, accordingly, his responsibility does not cease until the goods are delivered in the usual and ordinary course of delivery. It is the

custom of carriers by railway to deliver at their platforms, offices, warehouses, and wharves, upon application being made by the consignee or his agent, and, in the absence of any usage or special contract to the contrary, it is not incumbent on such carriers to deliver at the residence of the consignee. The duty of other carriers is to deliver the goods to the consignee at the place named by the consignor. If it be the business and custom of the carrier to deliver at the house to which the goods are addressed, it is obligatory upon him to do so, and to give notice to the consignee.[290] And where a carrier receives a reward for carrying the goods from the wharf at which he unloads to the consignee's address; or where he has always been accustomed to deliver the goods in that way, he is clearly bound to do so.[291]

A delivery of goods according to the directions on the label is sufficient to discharge the carrier.[292] If a carrier tender goods for delivery at the house of the consignee, and they are not accepted, his liability as a carrier ceases, he not being obliged to bring the goods more than once for delivery.[293]

The contract of the carrier is, to deliver the goods at the place to which they are booked, unless the consignee order the goods to be delivered at a different place. But if the consignee order the goods to be delivered at a place other than that named by the consignor, the carrier will be justified in so doing.

The consignee can claim delivery of the goods before they have arrived at their extreme or ultimate place of delivery, and the carrier's liability will terminate upon such delivery.[294]

So the consignor may, by notice to the carrier, change the destination of the goods during their transit; and the carrier will be responsible for not delivering the goods at such new destination. And if the consignor had the legal right to give such notice, and the carrier act upon it, he may set this up as an answer to an action by the original consignee for the non-delivery of the goods.[295]

In a suit, however, against the East Indian Railway Company for the value of goods consigned to the plaintiff, which defendants had received for delivery to plaintiff according to a railway receipt, but which they by direction of the consignors delivered to T. and Co. on a note of indemnity, it was held by the High Court of Calcutta that the handing over by consignors of the railway receipt to the plaintiff passed the right of possession and property in the goods to the plaintiff, who had a substantial interest in the consignment, and that the authority given to him by the consignors was coupled with an interest which neither they nor the defendants could revoke; and as plaintiff had no notice of T. and Co.'s equitable claim, the defendants were not justified in delivering to T. and Co., and were therefore liable for the wrongful delivery.[296]

Misdelivery.—The carrier must be careful to deliver the goods to the right person; if he deliver them to a person not entitled to receive them, this is a conversion of the goods for which he is responsible.[297] So if the owner gives express orders to a carrier not to land goods on a wharf, which is assented to at the time, but the carrier afterwards disobeys these orders, and delivers the goods into the possession of the wharfinger, whereby an extra charge is incurred, and the goods are detained until that is satisfied, it is evidence of a conversion by the carrier.[298] Where, on finding goods have been misdelivered by a carrier, the owner assents to the party who has received them selling them on his account, though that may be an acceptance of the delivery, it is, *per se*, no defence to an action for the misdelivery, as there is no consideration to make it a discharge, and it is merely accord without satisfaction.[299]

Refusal of Goods by Consignee.—When goods are tendered to the consignee and refused by him, or he is not in a position to pay the freight, or if the consignee cannot be found, the carrier then becomes an involuntary bailee of such goods, and is no longer liable as a carrier. It is, however, the carrier's duty to keep the goods at destination a reasonable time, and await directions as to their disposal from the consignor. He is not bound to advise the consignor of the refusal or non-delivery of the goods: but he is merely bound to do what is reasonable under the particular circumstances of each case.

If he afterwards deliver them to a wrong person, it will be a question for the Court whether in so doing he acted with reasonable care and caution.[300]

Where the consignee of a parcel refused to pay the amount charged by a carrier for the conveyance of a parcel as being excessive, and the carrier immediately sent it back from Plymouth, its place of destination, to London, whence it had been sent, and the consignee afterwards, but within a reasonable time after it had been tendered for delivery, offered to pay the sum charged, but the carrier refused to receive the same or to deliver the parcel, it was held that such conduct was unreasonable on the part of the carrier, and that he was liable for the value of the parcel.[301]

Return of Goods to Consignor.—Although the consignee has the power of ordering the goods to be delivered to him at any place other than that to which they have been consigned, the consignor may countermand or vary the direction at any moment of their transit, and demand back his goods on payment of the freight and charges of the carrier; but before delivering the goods back to the consignor, the carrier, for his own protection, should satisfy himself that the consignor has a legal right to the possession of the goods by demanding the return of the bill of lading, railway receipt note, dock warrant, or other document evidencing the title in the goods which the carrier may have given, or by communicating with the consignee,

in whom the property in goods while in transit is usually vested.[302]

Notice of Arrival of Goods.—Under Section 160 of the Contract Act, it is the duty of a bailee to return or deliver, according to the bailor's directions, the goods bailed, *without demand,* as soon as the purpose for which they were bailed has been accomplished; but this rule of law cannot be held to apply to carriers by railway, whose usage is to deliver only on their own premises upon application and upon production of the railway receipt. It may be taken for granted that any public carrier, other than a carrier by railway, is bound under this Section to deliver goods entrusted to him for carriage at their destination in accordance with the directions of the consignee, without waiting for a demand to be personally made by the consignee for delivery.

It has been argued and, in the case of common carriers, decided that carriers are bound to give notice of the arrival of the goods to the person to whom they are addressed, and are responsible as carriers until they do so, in cases where it is not, under the circumstances, their duty to deliver them.[303] But it has been ruled that this decision does not apply to carriers by railway, notwithstanding any local custom to the contrary. The arrivals of goods at the various large stations of a trunk railway are so numerous, frequent, and various in kind, that it would be nearly impossible to send a

special notice to each consignee of every parcel of goods or single article forwarded by train. If the carrier contracts to forward a parcel of goods to a station, he performs his contract by forwarding to that station, and it is the consignee's place to take measures to ascertain if his goods are or are not to hand, as he has, presumably, received from the consignor the railway receipt note, which is in itself an advice, and without the production of which he cannot claim delivery from the carrier without indemnifying him.[304]

But where the usual course of business was for the carrier, on the arrival of the goods at the place to which they were consigned, to send a notice to the address of the consignee, requesting the goods to be removed, and stating that that notice, endorsed as a delivery order, must be produced by the person who was sent for the goods; and, this notice having been sent, it was afterwards produced so endorsed by a person who was not the intended consignee; whereupon the goods were delivered to him: it was held that the carrier was not liable as for a misdelivery.[305]

An advice note sent by a carrier by railway to a consignee of goods is not such a representation of the possession by the former of the goods as will, without evidence of a custom to do so, entitle the consignee to act upon it in the way of re-selling the goods; nor will it, in the absence of wilful misrepresentation or culpable neglect, leading proximately to the consignee's suffering

loss, estop the carrier from denying that he in fact never had the goods, although the consignee had paid the carrier's charges in respect of their conveyance.

The plaintiff entered into a contract with A. & Co. to purchase goods which were consigned to him by defendants' railway. The railway company, without culpable negligence, advised the plaintiff of the arrival of *three* parcels to his address, whereas *two* only had been delivered to them for carriage. The consignee contracted to sell those parcels, and had to pay damages to his vendees in consequence of being able only to deliver two. The company did not notify the mistake to the plaintiff until he had re-sold:—*Held*, that the railway company were not estopped from showing that they never received the third parcel.[306]

Title of Consignor.—There are conflicting decisions in English law as to whether a carrier is or is not barred from disputing the title of the person from whom he has received goods to carry;[307] but this point is set at rest as regards India by Sections 165, 166, and 167 of the Contract Act, the last of which Sections provides that 'if a person other than the bailor claims goods bailed, he may apply to the Court to stop delivery of the goods to the bailor, and to decide the title to the goods.' So that in a case of disputed ownership all the carrier has to do is to refer the claimants to the Civil Court and retain the goods until the Court decides as to who is really the owner; or he may for

his own protection insist that the person who claims to have a better title to the goods than the consignor, shall, within a fixed and reasonable time, obtain an injunction from the Court restraining him, the carrier, from parting with the goods, and failing such person obtaining the injunction within the time so fixed, hold the goods at the disposal of the person from whom he received them.

Delivery to Second Carrier.—Where goods are delivered to one railway administration to be carried over the line of another administration, the entire contract is with the former.[308] But where one of the conditions on which goods were received by a railway company to be carried, stated that goods addressed to consignees beyond their own line of railway would be forwarded by common carrier or otherwise, as opportunity might offer; but that the delivery by the company would be considered complete, and their responsibility cease, when such other carrier had received the goods; and the company received goods on the above terms at A, directed to B, which was beyond their own line of railway; it was held the company were not liable for damage sustained by the goods whilst in the hands of the other carrier, although they made one entire charge for the carriage of the goods from A. to B.[309]

In another case, where the carrier, having conveyed the goods to the place where another carrier had to take them up, deposited them in his own warehouse for

the convenience of the owner of the goods, the latter carrier not having arrived; it was held, that the former was not liable for a loss occasioned by the destruction of the goods by fire whilst they were in the warehouse.[310]

In *Cairns* v. *Robins* goods were sent by a carrier, who delivered them to his customer accompanied by a printed bill, which stated that 'any goods that shall have remained three months in the warehouse without being claimed, or on account of non-payment of the charges thereon, will be sold to defray the carriage and othercharges thereon, or the general lien, as the case may be, together with warehouse rent and expenses.' The customer sent the goods back to the carrier's warehouse to await his orders. They remained there more than a year, and then were lost. The plaintiff brought an action treating the carrier as a bailee for reward, and a verdict found for the plaintiff was upheld by the Court of Exchequer on the ground stated by *Alderson*, B., in the course of his judgment, that there was evidence from which the jury might reasonably find, that in consideration that the parties whose goods were carried would pay a certain sum, the defendants would not only carry them, but would warehouse them for three months, the compensation so paid being a compensation not only for carrying, but for warehouse rent also.[311]

Freight, Prepayment of.—Every carrier can legally

demand prepayment of the freight upon goods delivered to him to be carried before he takes him into his custody, for no man is compellable, either in law or equity, to undertake a duty for another without reward, or upon a promise of future payment unless he assents freely to the arrangement. If the consignor refuse to prepay the carrier's charges, the latter may decline to receive and carry the goods, notwithstanding that his course of business or usage may be to book goods *bearing* freight for the convenience of his customers or for his own interests, for in doing so he merely waives but does not extinguish his legal right.[312] The hire must, however, be reasonable; and, as a general rule, the carrier is bound at common law to charge the same hire to all persons alike for the same class of goods carried under similar circumstances.[313] Where the carrier is at liberty to charge different rates, proof of the lower charge may be used as evidence to show that the higher charge is unreasonable.

Excessive Hire paid under Protest may be recovered.—If a carrier refuse to carry or to deliver goods except upon payment of an excessive sum demanded by him, which amount is paid under protest, the excess may be recovered back in a suit *for money had and received*, although no tender may have been made to the carrier of the smaller sum to which he was fairly entitled, but the suit should be instituted without any unnecessary delay, or the plaintiff may be held

to have consented to the higher charge and to have waived his right of action.

A plaintiff sued the Great Northern Railway Company to recover back 15,000*l.* which he alleged he had been overcharged as freight. It appeared from the evidence that the period over which the overcharges were sought to be recovered was from May 1872 to March 1877, but that in 1869 the plaintiff had written to the defendants protesting against the alleged excessive charges and threatening legal proceedings, and since that period he had issued two suits against them, but had not proceeded under either. He continued paying the excessive charges under protest, but took no action until 1880, when he instituted a suit. For the defence it was contended that it was inequitable to attempt to recover back money a large part of which had been paid to foreign railway companies and the whole of which had been dealt with by way of dividend or otherwise. They also contended that so far from being a protest by the plaintiff, the above facts afforded the strongest ground for their belief that the payments made by him had been voluntary and final. The Court at once gave judgment in favour of the defendant company.[314]

Recovery of Freight due.—A suit for freight due is maintainable by a carrier against a consignee or consignor according to the circumstances and conditions of the bailment. In cases where there has been an

express contract between the consignor or consignee and the carrier for the payment of the freight, such contract will determine who should be sued by the carrier. But where there is no such express contract, and the consignor in employing the carrier does so as the agent of and by direction of the consignee, the latter is liable to the carrier for his hire.

There may be instances in which the consignor is the proper party to be sued; as where he officiously sends goods to the consignee, as samples, &c., or goods not according to the contract, which the consignee refuses to receive; or where the consignment is made for the benefit of himself or his agent.[315]

Where the carrier's contract is with the consignor, the latter is liable for the freight notwithstanding any agreement between the consignor and consignee, and although by delivery to the carrier the property in the goods may have vested in the consignee. If the goods are booked to pay and the carrier deliver them without collecting the freight, he must look to the consignee for payment, and cannot sue the consignor in the absence of a contract or agreement to the contrary. It is, however, chiefly in cases where goods have been refused by the consignee that the carrier has to consider which party to sue, and in that case the consignor seems clearly liable for the carrier's charges. Of course, where the value of the goods exceeds the charges due on them, the carrier has the remedy in his own hands, and can

recover his freight by the public sale of the goods after due notice to the person or persons concerned.[316]

Preservation of Goods.—While the goods are in the possession of the carrier, he is bound to take proper means for their preservation, and it was even held to be within the scope of the duty of a railway company employed to carry quicks, to plant them, or allow them to be planted in their own land to preserve them.[317] When the carrier has, in accordance with the terms of the bailment, rendered any service, not arising from his ordinary duty as a carrier, involving the exercise of labour or skill in respect of the goods bailed, as in repairing leaky casks or other defects in packages or property where such defects have not arisen from the act or omission of the carrier; or has incurred expenses in the preservation of goods from extraordinary perils, such as danger arising from sudden floods, storms, &c.; or has paid money on account of the owner of the property, such as fees for veterinary treatment of animals taken sick or becoming disabled or injured while in transit, he is entitled to be reimbursed by the owner; and may retain the property until he receives due remuneration for the special service he has rendered, or has been repaid any expenses that he may have incurred.

If a horse is sent by railway, and no one appears to claim it when it arrives at its destination, the railway

administration is bound to take care of it, and, if necessary, is justified in sending it to a livery stable; and may sue the owner for the charges which it thereby incurs.[318]

Lien of Carriers.—Section 14 of the Railway Act provides, that if any person fails to pay on demand any sum due by him to a carrier by railway, or for the custody of any property, or for demurrage or wharfage in respect of the same, the railway administration may detain the whole or any part of such property; or, if the same have been removed from the railway, any other property of such person then on such railway or thereafter coming into the possession of the railway administration; and may also sell by public auction, in the case of perishable property at once, and in the case of other property on the expiration of at least fifteen days notice thereof, published in one or more of the local newspapers, or, where there are no such newspapers, in such manner as the local government may, from time to time, direct, sufficient of such property to produce the sum payable as aforesaid, and all charges and expenses of such detention, notice, and sale; or if such person fails to remove from the railway station within a reasonable time any property so detained, the whole of such property; and may, out of the proceeds of the sale, retain the sum so payable, together with all charges and expenses aforesaid, rendering the surplus, if any, of such proceeds, and so much of the property, if any,

as remains unsold, to the person entitled thereto; or such carrier may recover such sum by suit.

Wharfingers have also the right, in the absence of a contract to the contrary, to retain as a security for a general balance of account any goods bailed to them; but no other persons who come under the denomination of carriers have a right to retain goods as security for or in satisfaction of a general lien unless there is an *express* contract to that effect.[319]

In mercantile law, a lien for a general balance due to a carrier must be founded on a general usage of trade, or on a special contract between the parties to that effect. In *Rushforth* v. *Hadfield* it seems to have been admitted by the Court, that a lien claimed by a carrier for his general balance was not founded on the common law, but that such a lien might arise by contract between the owner of the goods and the carrier; and that usage of trade, if general, uniform, and long established, was evidence of such a contract; but the person who sets up such a claim ought to make out a very strong case, as general liens are not to be favoured, and it should be clearly shown that the customer had knowledge of the carrier's usage, and so warrant a conclusion that he contracted in reference to it.[320]

The onus of making out a right of general lien lies upon the carrier claiming it. There may be an usage in one place varying from that which prevails in another. When the usage is general and prevails to

such an extent that a party contracting must be supposed cognisant of it, then he will be bound by the terms of that usage. In places, however, to which the Contract Act extends, any carrier, other than a carrier by railway or a wharfinger, must show that there is an express contract between him and the owner of the goods to justify a general lien.[321]

Where a carrier had given notice that all goods would be subject to a lien, not only for the freight of the particular goods, but also for any general balance due from their respective owners, and goods having been sent by the carrier addressed to the order of I. S., a mere factor; it was held, that the carrier had not, as against the real owner, any lien for the balance due to him from I. S.[322]

But every carrier is entitled to retain any consignment of goods until his charges thereon have been paid.[323] When credit has not, by the express contract of the parties, been given for the payment of the freight due for carriage of the goods, the delivery of the goods to the consignee and the payment of the price of the carriage of them are concurrent acts to be performed at the same time, so that the carrier is entitled to retain possession of the things he has carried until he receives or is tendered his hire for their conveyance. If the consignee refuses to pay the sum demanded for the carriage of them, the carrier is not justified in at once sending them back to the place whence they came, but

must hold them a reasonable time, to see if the consignee will accept and pay for them.[324] If he still refuses, the carrier then holds them at the disposal and for the benefit of the consignor, and is entitled to look to the latter for the payment of his hire. But the carrier has no lien for anything beyond the price of the carriage of the goods conveyed, except where he is directly authorised by law or by an express contract to retain them as security for a general balance.[325]

When goods delivered to be carried are received from the waggon of the carrier by the consignee, and are merely carried into the warehouse to be weighed, the carrier has no right to charge for warehouse room; and, if the goods are taken up on the road, and have never been booked, he has no right to demand a booking fee; and if, after tender of the price of the carriage, he detains the goods for these small charges, the detention is unlawful, and a suit may be brought against him in respect of such detention.[326]

The mere letter of boats has not a lien for his hire upon goods which may be placed in the boats, and should he cause loss to the owner of the goods by wrongfully opposing their removal, he will be liable for the same.[327]

As liens exist only in cases where the parties entitled to them have possession of the goods, if a carrier part with the possession of the goods after the lien attaches, the lien is gone; and if it is once waived it cannot

afterwards be resumed. A contract for a carrier to retain goods as a lien for a general balance of account between him and the consignee does not affect the right of the consignor to stop the goods *in transitu*. A carrier who, by the usage of a particular trade or under a contract, is to be paid for the carriage of the goods by the consignor, cannot detain them against the consignee for a general balance due to him by the consignor.[328]

Carriers are bound to exercise reasonable care in the preservation of goods detained by them. If live stock be detained the carrier should feed and exercise them, and, in the case of milch cows and goats, milk them. In no case has a carrier a right to *use* the property detained by him.[329]

Time when Lien becomes Enforceable.—From Section 14 of the Railway Act it appears that a carrier by railway may enforce his claim to lien on account of money due to him whenever property belonging to his debtor comes into his possession; but the English courts have held that a carrier cannot in any case stop goods at the commencement of the journey and hold them under lien.[330]

Increase or Profit from Property Bailed.—A carrier is bound to deliver to the owner, or according to his directions, any increase or profit which may have accrued from the property while being carried or held under lien. For instance, a carrier detains a cow as security for pay-

ment of the fare due for the conveyance of the animal. The cow while so detained has a calf. The carrier is bound to deliver the calf as well as the cow to the consignee or owner. A mare while being carried by railway has a foal, the carrier must deliver the foal with the mare.[331]



CHAPTER XI.

THE LIABILITIES OF CARRIERS BY LAND AND INLAND NAVIGATION.

We will now consider the degrees of liability which attach to each class of carriers.

Liability of Carriers by Railway.—Until very recently the liability of carriers by railway in India was governed by the same rules of the common law as apply to common carriers in England. They were in the position of insurers, and were bound to answer for the goods entrusted to them for carriage against all risks, the acts of God and the Queen's enemies alone excepted.

The Railway Act of 1854, although it limited the responsibility of carriers by railway in respect to excepted articles, and defined the extent to which they were to be held answerable for goods carried under a special contract, in no way attempted to directly declare their liability in respect to goods carried in the ordinary course of traffic, but left such liability to be determined by the common law.

The Contract Act of 1872, in the chapter on bail-

ments, defines the degree of care which bailees are bound to exercise in order to escape liability for loss of or damage to goods bailed to them, but there being no reference in the Act to carriers *for hire*, this provision does not appear to have been applied to carriers by railway or common carriers until 1878, when it was considered by the High Court of Bombay in the case of *Kuverji Tulseedass* v. *Great Indian Peninsular Railway Company*, and there held to be the law under which the liability of all carriers is to be measured.[332]

In introducing the Railway Act of 1879, the Legislature adopted the same view as to the degree of responsibility which attaches to a carrier by railway as was held by the High Court of Bombay in the above-quoted case, and excepting such carriers altogether from the operation of the Carriers' Act of 1865, fixed the liability to be imposed upon them as that of bailees for hire under Sections 151 and 161 of the Contract Act; and the whole law on the subject of the responsibility of carriers by railway, for loss of or damage to property carried by them, is now contained in those two sections, controlled by Sections 10, 11, 12, 13, 14, 15, and 16 of the Railway Act.

Under this law a carrier by railway is bound to take as much care of the goods delivered to him to be carried as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality, and value as the goods bailed; and if by

the fault of the carrier the goods are not returned, delivered, or tendered at the proper time, he is responsible to the owner for any loss, destruction, or deterioration of the goods from that time.

Section 10 of the Railway Act provides that every agreement purporting to limit the obligation or responsibility thus imposed upon a carrier by railway shall, in so far as it purports to limit such obligation or responsibility, be void unless it is in writing signed by, or on behalf of the person sending or delivering the property, and it is otherwise in a form approved by the Governor-General in Council.

This exception corresponds to the proviso regarding special contracts in Section 7 of the Railway and Canal Traffic Act of 1854, with this difference, that while the latter Act provides that the special contract shall be effectual and relieve the company only, if it is held by the Court to be reasonable, thus leaving the validity of the contract to be determined *ex post facto*, the exception in the above section of the Indian Railway Act makes the contract good, if in a form to be approved beforehand, and thus avoids the uncertainty which, owing to the different views that may be taken by different judges as to the reasonableness of a contract, frequently attaches to such transactions in England.

As we have seen under the head of 'Special Contracts,' any contract tending to relieve a carrier abso-

lutely from liability for neglect or misconduct is usually held unreasonable in England; but there are cases in which it has been ruled that a carrier by railway may reasonably exempt himself, at least conditionally or partially, from such liability, as, *e.g.*, where he stipulates that he shall not be liable unless a claim is made within a certain time after the loss or damage has occurred, or where he is willing to carry subject to his ordinary liability at a fixed rate, but offers as an alternative to carry free from all liability at a lower rate, or where he exempts himself only from liability for damage arising from loss of market caused by delay. It is to meet cases of this kind that the exception has been introduced.[333]

In addition to this exception a carrier by railway is under Section II. of the Act exempt from *all* liability for loss, destruction, or deterioration of or damage to;—

Gold or silver coined or uncoined, manufactured or unmanufactured, plated articles, cloths and tissues and lace of which gold or silver forms part, precious stones, jewellery, trinkets, watches, clocks, or timepieces of any description, government securities, government stamps, bills of exchange, hundis, promissory notes, bank-notes, orders or other securities for payment of money, maps, writings, title-deeds, paintings, engravings, lithographs, photographs, carvings, sculpture and other works of art, glass, china, marble, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought

up with other materials; shawls, lace, opium, ivory, ebony, sandal-wood, sandal-wood oil, and musical and scientific instruments:—

Unless at the time of delivery of the same to the carrier, the value and nature thereof have been declared by the person sending or delivering the same, and an increased charge for the safe conveyance of the same, or an engagement to pay such charge, has been accepted by some railway servant specially authorised in this behalf.

Liability of Common Carriers.—According to the ruling of the High Court of Bombay, which we have before referred to, the English common-law rule under which common carriers are held liable as insurers of the goods made over to them for conveyance against all risks except the acts of God and the Queen's enemies is not now in force in India, and in cases not met by the special provisions of the Carriers' Act of 1865, the liability of carriers for loss of or damage to goods entrusted to them is that prescribed by Sections 151, 152, and 161 of the Indian Contract Act of 1872.

A common carrier, not being the owner of a railroad or tramroad constructed under the provisions of Act XXII. of 1863, may by special contract limit his liability for loss of or damage to property entrusted to him for carriage, provided such contract is signed on that behalf by the owner; and that the conditions contained in it are not unreasonable and do not exempt the carrier

absolutely from liability for all loss or damage arising from the negligence or criminal act of the carrier or any of his agents or servants.[334]

The owner of a railroad or tramroad constructed under the provisions of Act XXII. of 1863, and not coming within the operation of the Railway Act, is a common carrier, but unlike other carriers is debarred from limiting his responsibility by special contract. He is liable for the loss of or damage to property delivered to him to be carried, only when such loss or damage shall have been caused by negligence or a criminal act on his part or on that of his agents or servants.[335]

Like a carrier by railway, a common carrier is protected by statute from liability in respect of certain excepted articles, unless their nature and value have been declared by the sender; these articles are:—

Gold and silver coin, gold or silver in a manufactured or unmanufactured state, precious stones and pearls, jewellery, timepieces of any description, trinkets, bills and hundis, currency notes of the Government of India or notes of any banks, or securities for payment of money, English or foreign stamps and stamped paper, maps, prints, and works of art, title-deeds, gold or silver plates or plated articles, glass, china, silk in a manufactured state and whether wrought up or not wrought up with other materials, shawls and lace, clothes and tissues embroidered with precious metals or of which such metals form part, articles of

ivory, ebony, and sandal-wood, if above the value of one hundred rupees.

Writings, raw silks, opium, sandal-wood oil, and musical and scientific instruments, which are included in the schedule of the Railway Act, are omitted in that of the Carriers' Act, so that for articles of this description a common carrier is still liable whether they are or are not declared.[336]

The distinction between the liability imposed upon a common carrier and a carrier by railway is that the former is under any circumstances responsible for any loss or damage that may have arisen from negligence or the criminal act of himself or any of his agents or servants; and the conditions contained in any special contract which he may make are at all times subject to the decision of a court of law; whereas, a carrier by railway is not responsible for loss of or damage to excepted articles even if such loss or damage is due to negligence or a criminal act on his part or on that of his agents or servants, and any special contract made by him whatever its conditions may be, if in a form that has been approved of by the Governor-General in Council, is valid and beyond the jurisdiction of any civil court.

Where the goods are carried under a special contract the validity of which is unquestioned, the carrier's ordinary liability ceases, and is replaced by that created by the contract.

The Government of India in relation to its carrying business as proprietor of the Government bullock-train, mail carts, &c., holds an unique position as a carrier. It is not a common carrier, as it has been expressly exempted by the Legislature from the class of persons to whom the term common carriers has been applied in the Carriers' Act, nor can it be regarded as a carrier by railway, as, although its liability is *primâ facie* the same, it may without restriction limit or extinguish its responsibility by a special contract which neither a carrier by railway nor a common carrier can do; and its public profession coupled with its regular course of business as a carrier removes it from the class of private carriers.

In the case of the *Post-master of Bareily* v. *Earle*, tried under special appeal before the High Court of the North-Western Provinces, the position and liability of the Government as a carrier were clearly defined.

The plaintiff's agent at Calcutta delivered to the agent of the Government bullock-train eighteen parcels to be conveyed to Bareily. He paid the freight and received a receipt, on the back of which there was a notice calling attention to the conditions under which the Government undertook to carry the goods, and by one of these conditions it was declared that the Government would not be responsible for any loss of or damage to packages sent by bullock-train, whether caused by fire, tempest, or any negligent, improper, or

criminal act on the part of the person in charge of the train, or otherwise concerned in the delivery or conveyance of the goods, and that packages addressed to the stations of the bullock-train lines could only be booked to the nearest bullock-train office, and forwarded thence at the risk of the owner by country cart, or such other opportunity as might offer. The packages were duly despatched, but on the journey, as the Lower Appellate Court found, by reason of the negligence of the guard, one of the packages was stolen. The plaintiff applied to the Government for compensation, and, failing to obtain it, brought the suit to recover the value of the package.

The High Court delivered the following judgment:—

'The Judge has misconceived the purport of Act III. of 1865. That Act was passed to enable common carriers to limit their liability for the loss of property delivered to them to be carried, and to declare their liability. It defines what persons are to be regarded as common carriers under this Act, and it expressly exempts the Government from the class of persons so defined. It has no relation to the mails or any other department of the post office. The Legislature expressly exempted the Government from the class of persons to whom as common carriers the Act was to apply, and in our judgment in so doing it intended to declare not only that the Government as a carrier should not be subject to the provisions of the Act, but that it should not be regarded

as a common carrier, for the Act applies to all other persons in India who fall within the definition, and declares their liability. The object and intention of the law was, as it appears to us, to leave the liabilities of common carriers no longer uncertain and contingent on the notions of equity, justice, and good conscience which might be entertained by the courts, but specifically to prescribe the extent and the nature of the liabilities of all common carriers in this country.

'In this view the Government must be regarded in relation to its carrying business as an ordinary bailee for hire. As such bailee, apart from any special condition limiting its liability, it is bound to take ordinary care of goods entrusted to it for conveyance, and if goods are stolen through the negligence of its servants it is liable to make good the loss to the consignor. But it may, as may any other bailee for hire, limit its liability by conditions, provided those conditions are not repugnant to positive law or public policy. The condition on which the Government relies —the condition that it will not be responsible for loss occasioned by the negligence of its servants, is certainly not repugnant to positive law; on the contrary, it receives sanction from the immunity which is conferred expressly upon the Government as a carrier of letters, and it appears to us that it is not a condition which is repugnant to public policy. If a person engaged to carry goods from one place to another on

the terms that he was not to be held responsible for any loss arising from negligence on the part of his servants, and if it were held that effect should not be given to the condition, that liberty of contract would be fettered with which it is the soundest public policy to interfere as little as possible.

'Regarding the Government as an ordinary bailee for hire, we hold it was competent to attach to its contract the condition which we have considered. We therefore decree the appeal, and, reversing the decrees of the Lower Courts, dismiss the suit, with costs.'[337]

Private Carriers are liable as bailees for hire, and are bound to take the same care of goods bailed to them as carriers by railway and common carriers.

Such carriers may, however, limit their liability in any way they think fit by special contract, provided the conditions of such contract are not repugnant to positive law or public policy.[338]

All carriers of whatever description are exempt from responsibility for loss of or damage to property entrusted to them arising from the acts of God or of the Queen's enemies.

Act of God.—The expression 'Act of God' denotes a natural necessity and which arises inevitably, as earthquakes, volcanic eruptions, cyclones, typhoons, hurricanes, winds (even a sudden gust of wind), snow-storms, sand-storms, inundations, floods, alluvion, diluvion, lightning, fogs, mists, or such other acts as could not happen by the intervention of human means.

A loss is to be considered a loss by the Act of God if it is occasioned by the elementary forces of nature unconnected with the agency of man or other cause, and a common carrier (and *à fortiori* any other carrier) is entitled to immunity in respect of loss so occasioned if he can show that it could not have been prevented by any amount of foresight, pains, and care reasonably to be required of him, if he has used all the means to which prudent and experienced carriers ordinarily have recourse to insure the safety of goods entrusted to them under similar circumstances.

A carrier does not undertake to guarantee the safety of goods against irresistible acts of nature; and if he is in a position to prove that an act of nature formed the sole, direct, and irresistible cause of the loss, he is discharged. In order to show that the cause of the loss was irresistible, it is not necessary to prove that it was absolutely impossible for the carrier to prevent it, but it is sufficient to prove that by no reasonable precaution under the circumstances could it have been prevented.[339]

If goods be destroyed by fire occasioned by lightning, this is a loss by the Act of God, and the carrier is not liable.[340]

Queen's Enemies.—By the Queen's enemies is to be understood foreign enemies of the Queen which are such by open declaration of war, and not domestic enemies, as dacoits, robbers, thieves, or other private depredators, however much they may be deemed in a moral

sense to be at war with society. Losses, therefore, which are occasioned by robbery on the highway, or by the depredations and violence of mobs, rioters, insurgents, and other offenders against the public peace or security, are not considered losses by enemies; but losses by pirates on the high seas are so deemed, for pirates are the common enemies of all mankind.[341]

But if a carrier should act with so little precaution as to bring upon himself a loss by an act of the Queen's enemies, as by rashly sending goods through a district known to be occupied by them, he would not be excused.[342]

Act of Law.—A carrier is excused for non-performance of a contract to carry where it is occasioned by an *act of law.* If, therefore, goods have been received by a carrier in British India for despatch to any native or independent state, whether inland or beyond the seas, and the Government of India or the local government should prohibit commerce or intercourse with the place of destination, or the exportation of articles of the description of those agreed to be carried, the contract would be dissolved, and the carrier would be excused from carrying the goods.[343]

A mere embargo or temporary restraint upon commerce with another state imposed by Government is not, however, such an act of law as will dissolve the contract, or discharge the carrier from his obligation to carry and deliver the goods; though it may excuse him

for delay in delivering the goods, or for any damage they may sustain during their detention in consequence of the embargo.[344]

A blockade of the port of *departure*, imposed after the contract of carriage has been entered into, appears to be only a *suspension* of the performance of the contract for carriage; but a blockade of the port of *destination* operates as a complete dissolution of the contract.[345]

Liability for Excepted Articles.—The protection afforded to carriers by Section 2 of the Railway Act and Section 3 of the Carriers' Act does not extend to *delay* in carrying or delivering goods of the class specified in the schedules therein referred to, when such delay is unreasonable, and it has been held that they are liable for the consequences of any such delay unless it has arisen from the goods having been lost.

In the case of *Hearn* v. *London and the South-Western Railway Company*, the plaintiff claimed damages for delay in delivering a portmanteau which had been made over to the defendants as luggage to be conveyed with the plaintiff as a passenger from Waterloo Station to Southampton. The defendants pleaded that the portmanteau contained title-deeds and writings, and that the value and nature thereof were not declared nor any increased rate of charge paid as required by the Railway Act and therefore they were not liable :—*Held*, that the Company were exempted only from being

responsible for a *loss* by them of the particular article named, and that there must be a judgment for the plaintiff.[346]

The doctrine of thus holding carriers responsible for *delay* to property specified in the schedule of exceptions for the *total loss* of which they cannot be held liable, may be strict law, but can scarcely be considered sound policy, inasmuch as it offers a powerful inducement to a carrier, in the event of a package being mislaid in the course of transit or missent to some station other than its destination, to convert what might have been only a slight detention into an actual loss by exhibiting a want of due diligence in making his inquiries in order to shield himself from a possible claim for damages on account of the delay.

But a *temporary* loss of the goods will excuse the carrier for delay in their delivery. Where goods mentioned in the schedule of exceptions were delivered to a railway company without their value having been declared, and an action was brought against the company for not delivering within a reasonable time, it was held by the Irish Court of Common Pleas that as the defendants were no more liable for a temporary loss of the goods than they would have been for their total or absolute loss, a plea excusing a delay in the delivery upon the ground of a temporary loss of the goods while they were in charge of the company was a good and sufficient answer to the action.[347]

A carrier by railway is not deprived of the protection given him by the Act by the fact that the loss or injury to goods of the excepted class happens after they have been negligently taken by him beyond their place of destination.

The plaintiff took a ticket from York to Darlington. Before starting on the journey he handed two water-colour drawings (which were tied together face to face, so that it could be seen that they were pictures of some kind) to the guard, asked him to take care of them, and saw them labelled for Darlington. The pictures were within the schedule of excepted articles, but the plaintiff made no declaration of their value. When the train arrived at Darlington the plaintiff got out, took a fresh ticket for Barnard Castle, and told the porter to see that the drawings were taken out and put in the train by which he was starting. The drawings, however, were not taken out but were carried on to Durham, and when they were recovered by the plaintiff had sustained considerable injury:—*Held*, that the plaintiff was not entitled to recover for the damage to the drawings, on the ground that the company were protected by the Act, which applied to the case of goods negligently carried beyond the point of destination.[348]

Where there is one entire contract to carry partly by land and partly by sea, the contract is divisible, and as to the land journey the carrier is within the protection of the Act in respect of excepted articles.[349]

Insurance Rate.—It has been, and probably is now, the practice of many carriers by railway in India to levy an insurance rate according to the declared value of goods, coming within the schedule of exceptions, but an insurance rate is not an increased charge strictly within the meaning of the Act, and it has been argued with some degree of reason that insurance is a separate contract, which may be treated as an independent transaction collateral to the carrier's contract, but not affecting his liability as fixed by the Act.

In a suit against the Punjaub Railway Company for the value of a bale of silk which had been tampered with in the course of transit upon the defendants' railway, the silk having been abstracted from the package and hemp substituted, the following issue among others was fixed:—

Whether the plaintiff, according to Section 10 of Act XVIII. of 1854, on delivering over the parcel to the railway company, declared the nature and value of the contents of the parcel, and whether by reason of the contents being declared as silk *an increased charge* for safe conveyance of the parcel was accepted by the defendants.

The evidence left no doubt that the parcel delivered to the defendants contained silk, and the reasonable presumption arising on the case was that the hemp was substituted whilst the parcel was in the custody of the railway company's servants.

The following judgment was delivered by the Chief Court of the Punjaub on appeal:—

'The parcel was booked at Umritsur through one Bela Ram, the servant of a person carrying on business in silk stuffs at the Umritsur Station, who, together with Rajkour, the plaintiff's servant, on the morning of September caused the parcel to be labelled "silk" in the presence of Sheodyal, a railway servant. Bela Ram was then supplied with a blank form of forwarding note, which he filled in outside of the office of the assistant station master, Hurdyal. A red ink form was used, such as Bela Ram by his own admission knew to be in use when goods are sent at owner's risk. Bela Ram then coming into Hurdyal's office showed the form, declared the parcel to contain silk, and was told by the latter to "insure." This he declined to do, and on declining so to do wrote on the forwarding note, which is in evidence, the words "*Nuksan zimmah malik*," in Goormukhee.

'The parcel was sent bearing payment, and the rate charged for the parcel was 4½ annas per maund, the rate for silk charged by the railway company according to their advertised classification of goods and rates, silk being in a class of goods of which the carriage is charged at higher rate than that of certain other commodities.

'Accordingly, there being no doubt as to the declaration of the contents of this parcel, it becomes a ques-

tion under the first issue whether the railway made an extra charge in respect of it. Section 10 of Act XVIII. of 1854 declares that the railway company shall not be answerable for loss of or injury to any of the articles enumerated in a list which includes silk (which shall have been delivered to the railway company either to be carried for hire or to accompany a passenger), unless the value and nature of such articles shall have been declared by the person sending or delivering the same, and an increased charge for the safe conveyance thereof shall have been accepted by some person specially authorised to enter into such engagements on behalf of the railway company. The acceptance of an increased charge in fact replaces the railway company as common carriers in their common-law position of insurers.

'Now, the evidence showed that the railway company have a system by which an increased charge is taken in respect of silk and the other articles enumerated in Section 10, and that they term it an insurance rate.

'At the same time, this insurance rate is not identical with the charge according to the class of goods or charge specified in the advertised classification of goods, that charge having reference to the weight, traffic, value of merchandise, and other considerations. The advertised list of classes expressly states that the increased charge made for goods in some of the classes does not include what is termed insurance, and in this

case Bela Ram showed clearly that he so understood his contract with the company. Under these circumstances, it is impossible for the Court to adopt the view that an increased charge as contemplated by the Act was accepted by the railway company. But it still remains to consider the point that was argued at the hearing that the defendants have precluded themselves from taking any defence under Act XVIII. of 1854, by themselves departing from the requirements of the Act, and by their not having affected to proceed in accordance with it when the parcel was booked. It is contended that not having demanded an increased charge they cannot rely on not having accepted it. Insurance, it is argued, is a separate contract, which may be treated as an independent transaction collateral to the carrier's contract, and not affecting his liability, which is compounded of the duty undertaken in carrying, and the conditions which he and the owner are called on to fulfil by the Act. The fact that the parcel was sent bearing seems at first to support the view that the railway company having accepted the duty of carrying but not having made the increased demand which they might have made, are liable notwithstanding the words of the Act.

'The Act no doubt requires as a condition on which the immunity of the railway company depends that they should have accepted an increased charge, implying on their part a demand for it. But "increased

charge" is not increased "payment," and the Act leaves untouched the right of the railway company to refuse to take goods unless the hire is first paid, and prepayment may be made a term upon which the railway company may insist under the power given to them of accepting.

'The cases decided upon the English statute 11 George IV., 1 W. IV., c. 68, which, except in requiring a tariff or notice to be exhibited of the sums which the carrier means to charge for the enumerated articles, does not materially differ as regards the points now under consideration from the Indian Railway Act, show that the making of the demand may be effected in a general way. In *Behrens* v. *The Great Northern Railway Company*, 30, L. J., Exch., 153, *Wilde*, B., pointed out the usual steps in such cases under the 11 George IV. & 1 W. IV., c. 68. "The sender must first declare the value of the parcel, then the carrier must demand the extra rate, which the sender either pays and is insured, or the sender refuses to pay and insures himself, and then the carrier takes the parcel." Now, in this case, as appears from the evidence above stated, there was a substantial compliance with all the required steps. No doubt the increased charge might be made by way of requiring increased payment at the end of the journey. But in this case the facts show that neither party contemplated the charge being made in this way; and the use of the term "insurance" instead of "increased

charge prepaid" cannot alter the rights of the parties. The amount of increase required was not stated by Hurdyal, but Bela Ram on behalf of the owner dispensed with further particulars as soon as insurance was mentioned. It probably is essential that the premium for the insurance should be either agreed upon or taken contemporaneously with the agreement by the carrier to carry the parcel, and that the owner should not be put off to enter into another transaction with third parties. But the insurance was suggested at the time of the booking by the railway servant, and declined. In the present case the words of the Act appear to the Court to be wide enough to render the railway company irresponsible for the loss that has been shown, whatever may be their effect where specific acts of wrong are proved against the company or their servants.

'Another part of the case requires notice, although the decision of it is based on the Act above mentioned. The goods receipt contains a printed notice in English on the back of it to the effect that the railway company will not be responsible under circumstances precisely the same as those mentioned in the Railway Act, to which however the notice does not refer. The Railway Act does not interfere with special contracts, and it may be that in taking the receipt the owner assented to sending the goods on these conditions, although the words "*Nuksan zimmah malik*" did not

signify the sender's knowledge of the above term. It is not necessary, however, to discuss the effect of this special notice, as the decision of the case rests on other grounds. The express contract between the parties might alter their position at law, and the liability of the railway company as declared by the Act, on the principle of *modus et conventio vincunt legem*, but it does not affect so to do; and the terms of the special contract, if they are taken to have been assented to, only reiterate the terms of the Act.

'The appeal is dismissed, but in regard to the defence made by the company, each party to bear his own costs throughout.'[350]

It has been ruled that where framed pictures are sent by a carrier, the frames as well as the pictures are within the protecting clause of the Act.[351]

Coloured imitations of rugs and carpets and coloured working designs, each of them valuable and designed by skilled persons, and hand painted but having no value as works of art, are not paintings within the meaning of the section.[352]

Declaration of Nature and Value.—Mere mention of the value of the contents of a package to a station-master is no declaration of the value within the meaning of the Act, if it was not intended to operate as a declaration of value.[353] The consignor is bound by his declaration, and when any property of which the nature and value have been declared has been lost, destroyed,

or damaged, or has deteriorated, the compensation recoverable for such loss, destruction, damage, or deterioration shall not exceed the value so declared. The owner cannot give evidence of the falseness of his own statement in order to throw an increased responsibility upon the carrier.[354]

A common carrier is not protected by the Carriers' Act from liability for loss of, or damage to, excepted articles exceeding in value one hundred rupees even when undeclared by the sender, where such loss or damage shall have arisen from the negligence or criminal act of the carrier or any of his agents or servants.[355]

Section 8 of the Indian Carriers' Act on this point appears to rest upon the English case of *Owen* v. *Burnett*,[356] in which it was held that notwithstanding the statute, the carrier is still answerable for gross negligence on his part which has occasioned a loss of property such as the Act directs to be insured, even although the owner has neglected to insure it; for the protection given to the carrier by the Act is substituted for the protection which he formerly derived from his own notice, and the former, therefore, will not now protect him in a case in which the latter would not have been allowed to do so in consequence of his own misconduct. But this case was overruled by that of *Hinton* v. *Dibbin*, in which the Court of Queen's Bench held that in a case within the Carriers' Act, the carrier

is not liable for a loss of articles mentioned in the statute although such loss may have been occasioned by *gross negligence not amounting to a misfeasance.*[357]

Criminal or Tortious Act of Carrier.—Carriers may be proceeded against criminally in certain cases. The rule of the common law is that to constitute a felonious or criminal act, the property must be taken from the actual or constructive possession of the owner, and therefore the tortious conversion of goods delivered into the possession of a carrier for a particular purpose does not amount to felony.

If a carrier to whom a package is delivered to be carried to a certain place take away the whole of the package, it is no felony.[358] But if he should break the bulk, and carry away the whole, he will be guilty of a criminal act, amounting to felony.[359] The reason of this distinction appears to be, that the breaking bulk is an act of trespass which determines the privity of contract; whereas if he do not break bulk, there will be no trespass committed, and therefore there can be no felony.[360] If, however, the goods are delivered to him to carry to one place and he carry them to another, and there appropriates them to his own use, it is felony, because by so doing he declareth that his intent originally was not to take the goods upon the agreement and contract of the party, but only with a design of stealing them.[361]

So if, after he has brought them to the place appointed, he take them away again secretly and *animo furandi*, he is guilty of felony, for the possession which he received from the owner, and the privity of the bailment being determined, his second taking is as though he were a mere stranger.[362]

Carriers are generally answerable for the honesty of their servants; if, however, the plaintiff's own conduct, in full knowledge of the circumstances, be such as to lead to the loss, if he afford undue temptation and facility to the crime of the servant, he can maintain no action for a loss thus occasioned by his own fault.

In an action against a carrier for value of goods alleged to have been stolen by his servants, it is sufficient to prove facts which render it more probable that the felony was committed by some one or other of his servants than by any one not in his employment, and it is unnecessary to give such evidence as would suffice to convict any particular servant.

On January 29 the plaintiffs delivered a box of jewellery worth more than 10*l*., although the nature and value was undeclared, to the defendants, as common carriers, for carriage to the L. Hotel, Liverpool. The box was transmitted by the defendants' railway, reached the Liverpool Lime Street station on their line the next morning, and was entered with other parcels directed to the same hotel, in the railway book of H., a carman employed by the defendants' agent to deliver

goods. H. then went with his cart to the hotel, and there, while allowing the housekeeper to sign a receipt for three parcels, only delivered two. The hotel manager, however, noticed the deficiency, and asked him where the other was. H. said, 'Isn't it there?' and on being answered in the negative went out to search his van, but came back saying that he could not find the parcel. This was the plaintiffs' box. On Monday, February 10, some of the jewellery was handed to a detective by a pawnbroker, with whom it had been pledged. Two men were apprehended in consequence. One of them took the detective to a siding of the station, and there, at a place a hundred yards away from the spot, near the defendants' parcels delivery office, where the cart was loaded, a small piece of .the jewellery and a bit of a broken box were picked up. The men were released, and afterwards the articles found were shown to the clerks in the office, one of whom, W., said that on the Thursday before he had found a pin near the same spot, and another man had found two. When told that he ought to have spoken about it, W. answered that he did not think it worth anything.

In an action against the defendants for the loss of the jewellery, they pleaded the Carriers' Act (1 Will. 4, c. 68, s. 1), to which the plaintiffs replied that the loss arose from the felonious acts of servants in the employ of the defendants and not otherwise. At the trial the facts above stated were proved, the defendants

called no witnesses, and the jury found a verdict for the plaintiffs:—*Held*, that having regard to the fact of the defendants' servants not having been called to rebut by their explanations the *primâ facie* case made out against them, there was evidence to go to the jury in support of the replication.[363]

When the Carriers' Act is pleaded to an action against a carrier for loss of excepted goods which have not been declared, proof that the goods were stolen and that the servants of the carrier had greater facility of access than other persons is not evidence of felony by the servants.

A box containing silk was delivered to a railway company, not declared, and despatched by goods train on a truck. On the journey, after stopping at two junctions where the train divided, the box was found broken open and the silk gone:—*Held*, no evidence of felony by the servants of the company.[364]

Robbery—Theft.—A carrier is only liable for loss by robbery or theft of goods bailed to him when he could have prevented it by the exercise of ordinary prudence and care.

The distinction between robbery and theft was illustrated in the case of *Latham* v. *Stanbury*. Where the carrier received a parcel and became answerable for its delivery, 'fire and robbery excepted,' and the carrier deposited it in a desk in his office and left it for a short time, the key remaining in the door, and on his return

the parcel was gone, *Abbott*, C.J., directed the jury that the loss could not be considered as occasioned by a robbery within the exception of the contract, the distinction being between a pilfering by stealth and a robbery by *vis major*.[365]

Liability for Loss by Fire.—According to the English common law, a common carrier is liable for the loss of goods occasioned by fire, even though the fire was not caused by any actual negligence of the carrier and did not arise on his premises; but as the law now stands in India, no carrier could be held liable for losses so occasioned if he could show that the fire was accidental and was not owing to negligence of himself or servants, and that there was no want of diligence shown by him in trying to save the goods. The onus of proof is on the carrier, and if he can show that the fire was due to the act or negligence of a stranger or to a cause which no precaution on his part could guard against, as spontaneous combustion, or that every prudent precaution had been taken by him to prevent its occurrence, he is at once discharged from liability.

Liability for Leakage.—A carrier is not responsible for leakage arising from the inherent infirmity of vessels containing liquids, as from an imperfection in the bung of a cask entrusted to him to be carried, where there has been no negligence or omission on his part.

In an action against a railway company for injury to casks of oil alleged to have arisen from defects in the

casks, it was left to the jury to say whether it arose from such defects, and whether, even if it did, the carriers knew or ought to have known thereof, and had acted negligently in sending the casks on in that state.[366]

So if a pipe of wine upon the ferment burst in the waggon while being carried with ordinary care, the carrier is not liable, for the fault is in the wine, and the carrier does not accept responsibility against defects in the thing itself. But if a cask of brandy should leak during the journey, and the carrier take no means to stop the leak when it comes to his knowledge, he would be liable for the loss.[367]

Liability for Damage by Rats and Mice.—It has been held that carriers are responsible if the goods entrusted to them be damaged by rats or mice, although the carrier may keep cats in the warehouse where the goods are deposited by him in his character as carrier; but this ruling rests upon the common-law liability of a carrier to answer for the goods at all events, and were a claim on account of such damage put forward in India, it would have to be shown that the carrier knew the warehouse was infested by such vermin, and proof that he had adopted ordinary means for their extermination would be a sufficient answer.[368]

Inherent Decay or Deterioration of Goods.—A carrier is not liable for losses which arise from the ordinary wear and tear and chafing of goods in the

course of their transportation, or from their deterioration in quality or quantity while in transit, or from their inherent or natural tendency to damage or which arise from the personal neglect, wrong, or misconduct of the owner or consignor thereof.

Thus, for example, the carrier is not liable for any loss or damage from the ordinary decay and deterioration of oranges, mangoes, betel-leaves, or other fresh fruits, vegetables, or provisions, or from the ordinary diminution or evaporation of liquids, or from the spontaneous combustion of goods, or from their tendency to effervescence or acidity, or from their not being properly put up and packed by the owner, for the carrier's implied obligations do not extend to such cases.[369]

If the goods carried are in their nature liable to peculiar risks, and the carrier takes all reasonable care and uses all proper precautions to prevent damage or injury, and they are nevertheless damaged or destroyed by such risks, he is excused.[370]

Delay in delivery of Goods at Destination.—It is the duty of a carrier not only to carry safely, but also, if no time be stipulated, to carry within a reasonable time, but he is not responsible for the consequences of delay due to causes beyond his control. Therefore a railway company, who were prevented by an unavoidable obstruction on their line from carrying the plaintiff's goods within the usual (a reasonable) time were held not liable for damage sustained by the goods in

consequence of the delay.[371] And this ruling would apply to cases of detention of goods in transit owing to great pressure of traffic in time of famine, war, or other cause of a like nature.

A plaintiff forwarded goods to an agent by the defendants' railway, and, owing to a delay occasioned by negligence, the goods did not arrive at their destination until the agent had gone. The plaintiff was held not entitled to the profits he had lost by the delay, they having been delivered to the defendants without notice of the purpose for which they were sent.[372]

When there has been an unreasonable delay in the transmission of goods, and the consignee has lost his market for them, he has a right to say to the carrier, If you have the goods here now at this moment I am ready to take them, but if you have them not here now I will not accept them, you must keep them yourself and pay me their value.[373]

A contract, however, by a railway company to carry goods by a given train which ordinarily arrives at a certain station at a particular hour, does not amount to a warranty that it will so arrive, although the company's servants be informed that the object of the sender requires that it should so arrive. Fresh meat was carried by the defendants for the plaintiff under a condition that the company were to be held free from all liability for any damage resulting from loss of market, provided that the meat was delivered within a reason-

able time after its arrival at destination :—*Held*, to be a reasonable condition, and that the company were not liable for delay.[374]

Wrong Delivery of Goods—Conversion.—The delivery of goods to the proper person is generally conceded to be the duty of the carrier, and he must be careful to deliver them to the person to whom they are booked ; if he deliver them to a person not entitled to receive them, this is a *conversion* of the goods for which he is responsible.

A railway company having carried goods from one of its stations to another, the station-master at the latter station, without making inquiries of the consignor, after a delay of a week delivered them to a person of a name very similar to that of the consignee. The contract of carriage was at a reduced tariff, conditioned to exclude all liability except for wilful misconduct :—*Held*, that the delivery of the goods amounted to misconduct.[375]

Where H., an agent for obtaining orders for the plaintiffs' goods in Glasgow, directed them to send parcels of goods to C. & Co. and T. & Co. respectively, giving the addresses of those firms in Glasgow, the defendants in accordance with the plaintiffs' instructions carried the goods to Glasgow and there deliverved them (having observed all the rules of their ordinary course of business) to the addresses written on the parcels. H., who had indorsed delivery orders in the names of the

firms, received the parcels at both addresses and made away with them. The name of C. & Co. was found put up at the one address, but there was no such firm or name as T. & Co. at the other:—*Held*, that the defendants having, in following the plaintiffs' directions, pursued *bonâ fide* their usual course of business, were not liable for misdelivery in case of either parcel.[376]

A carrier is to deliver according to the direction of his employer, and if he require the carrier to deliver at a different destination to that originally named the latter is bound to do so, and is liable for a loss occasioned by his not obeying the instructions given him.

In the case of *Scothorn* v. *The South Staffordshire Railway Company*, the plaintiff delivered at a station of the South Staffordshire Railway Company certain goods addressed to the East India Docks, London, and paid one sum for their carriage the whole distance. By the practice of the South Staffordshire Railway, all goods delivered at that station for London are forwarded on their own line to Birmingham, and from thence by the London and North-Western Railway. Before the goods in question arrived in London, the plaintiff directed a clerk at the London station of the latter company to forward them to another place, which the clerk promised to do. The goods, however, were delivered according to their original address and thereby lost, and it was held that the South Staffordshire Railway Company were responsible for the loss.[377]

If a carrier deliver goods by mistake or inadvertence to a wrong person, or put them into the custody of a third person, contrary to the orders of his employer, this is a conversion, and it is a conversion if the goods be delivered to a wrong person, though they be obtained from the carrier by means of a forged order, such order being a nullity.[378]

If a carrier draw out part of the contents of a cask and fill it up with water, it is a conversion of the whole, and if goods be lost by the wilful negligence of the carrier this is a conversion of them.[379]

A demand of the goods and a refusal to deliver them are generally relied upon as evidence of a conversion, but to make them so it should appear that the goods were at the time in the custody of the carrier, and capable of being given up by him but were wrongfully detained; therefore if the goods are not at the moment in his possession or under his control, as if they have, in fact, been lost by or stolen from him, there is no conversion. So if he claimed to detain them for his hire there is likewise no conversion.[380]

Non-delivery of Goods.—A carrier is excused for a non-delivery of goods by any act of the owner which discharges the carrier from any further liability, as if the carrier, with the consent of the owner, delivers them to another carrier; or if the owner take over custody of the goods in their transit; or if there has not been a sufficient delivery to the carrier to make

him liable;[381] or if the non-delivery has been occasioned by the illegal act of the owner, as in sending contraband or prohibited goods which have been confiscated as such by the civil authorities,[382] or where the goods have perished from their inherent infirmity or decay, or have been destroyed by the municipal authority as prejudicial to the public health,[383] or have been stolen by robbers without any negligence on the part of the carrier, or have been destroyed by accidental fire,[384] or their loss has been caused by the acts of God or the Queen's enemies, or by inevitable accident, or they have been forfeited, or their delivery has been prohibited by an act of law or State, or where they have been attached in execution of a decree or other order of a civil court, or where he has a legal right to detain them as security for his hire on account of freight due upon them, or for a general balance of account.

Where time, however, is essential to the contract, the carrier is liable for non-delivery at the time specified.

The plaintiff was a dealer in cattle-spice, and was in the habit of going about to agricultural shows exhibiting samples of his goods. He so exhibited them at Birmingham, and desiring to exhibit them at Newcastle he had them delivered to the agent of a railway company who had an office on the show-ground at Birmingham. The plaintiff's agent filled up a forwarding note describing the goods as sundries, and indorsing

it 'must be delivered Monday certain.' A conversation also took place between the sender and the company's agent with reference to the vital importance of having the goods at Newcastle in time for the show on Monday. The goods did not arrive at Newcastle in time for the show, and the plaintiff sued the company for his expenses and loss of time in going to Newcastle, and also for his profits :—*Held*, that the plaintiff was entitled to damages, the surrounding circumstances justifying the inference that the clerk knew the purpose for which the goods were wanted, and made that the basis of the contract so as to render the company responsible for the damage naturally flowing from the non-delivery.[385]

Short Delivery.—If goods weighing a certain weight are delivered to a carrier to be carried, and when the goods arrive at destination the weight is deficient, this is evidence from which the Court may infer negligence in the carrier, and the onus of proving that the deficiency of weight has arisen from dryage, leakage, or other cause of a like nature, and not from his negligence, lies on the carrier.[386]

When the goods consigned to a carrier are packed, the fact of there being a deficiency in the weight on their arrival at destination is not sufficient to charge the carrier with liability unless the package bears evident marks of having been tampered with. Where the consignees refused to take delivery of two bundles of cow-hides carried by the railway company, on the

ground of shortness in the number of pieces, and there was no evidence that the bundles had been broken, or the hides counted by pieces, the railway company were declared not liable.[387]

Improper Packing of Goods.—A carrier has a right to demand that all property liable to breakage or other damage from the ordinary risks of transit shall be packed, and when this is not done, or the goods are improperly packed, the carrier is discharged from responsibility for any damage they may sustain during their transportation.

B. intending to send furniture by railway wrote for rates, and subsequently asked whether the rates included packing and unpacking. The rates were forwarded with an extract of the notices and conditions relating to the terms on which goods could be forwarded, one of which was that the railway company would not be responsible for improper packing. There was also a notice that an officer of the company had power to dispense with the conditions. The company declined the packing and unpacking. When their carman, in pursuance of instructions from B., arrived to fetch away the furniture, it was found not to be packed (although there were materials at hand for the purpose), and as the carman declined to undertake the packing himself, it was conveyed away unprotected, and suffered damage during transit:—*Held*, that it was B.'s duty to pack the furniture, and that as the damage was occasioned by his

neglect to do so, he was not entitled to recover compensation from the railway company.[388]

Misdeclaration of Goods.—Under Section 150 of the Contract Act, the bailor is bound to disclose to the bailee faults in the goods bailed of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and if he does not make such disclosure, he is responsible for damage arising to the bailee from such faults.

It is the duty of every person sending goods by a carrier to correctly describe them, and to make use of no artifice or fraud to deceive him, whereby his risk is increased, or his care and diligence may be lessened, or he be thereby induced to make a lower charge for their conveyance than he is legally entitled to. If there is any such fraud or unfair concealment regarding the contents or value of a package, it will exempt the carrier from liability for its loss under the contract, or, more correctly speaking, it will render the contract a nullity.[389]

Under the Railway Act any person required to give an account of the quantity and description of any property who neglects or refuses to give such account, or who wilfully gives a false account, shall be punished with fine, which may extend to five rupees for every maund of such property; and such fine shall be in addition to any charge to which such property may be liable.[390]

But where the sender makes a mistake in declaring the contents of a package without any fraudulent or wrongful intention on his part, he may recover the value of the goods *as so declared* in the event of their loss through the negligence of the carrier, but he cannot claim compensation for the actual contents of the packages, where their value is greater than goods of the nature he has declared them to be.

The plaintiff, when signing a forwarding note for twelve bags of sugar-candy, erroneously but without fraudulent intent stated the contents of the twelve bags as alum, for which a lower freight was charged by the defendants. Ten of the bags were destroyed by fire while in course of transit:—*Held*, that the plaintiff was entitled to recover, in respect of the ten lost bags, the value of alum only and not sugar-candy, while the defendants could not in respect of the said ten bags charge freight as for sugar-candy.[391]

Dangerous Goods.—A duty is imposed by law upon persons forwarding dangerous goods through the agency of a public carrier to give notice of the dangerous character of his goods to the carrier, in order that they may be carried with that degree of care the absence whereof might entail danger on the carrier or his servants. The breach of this duty is a criminal offence when the goods are sent by railway, and in all cases, if productive of damage, is actionable.

But to render the sender of such goods responsible,

it must be shown that he was aware of their dangerous nature when he delivered them to the carrier, or that his servants or agents for whose acts he is liable had such knowledge.

A. received from N. some cases containing vitriol, and sent them by railway. The nature of the goods was not marked on the packages, or known to A. when A. received the packages. N. in answer to an inquiry by A. informed A. that the cases contained gun-stocks and other goods of a harmless nature, and A. so described them in the forwarding note sent by him with the goods to the railway :—*Held*, that A. had been misled by N. as to the nature of the goods, and had no guilty knowledge of their dangerous character; he was not therefore liable as a sender of the goods within the meaning of the Act.[392]

Foreign Railways—Intermediate Carriers.—Where goods are transferred from the original contracting carrier, his liability continues until they are delivered, if it is one entire contract and such transfer be only *accessory* to the performance of his own duty, or the terms of his contract; all intermediate carriers employed being only regarded as his agents. But where his undertaking or duty is complete and ended, and the goods have passed, according to the directions he received with them, out of his hands, the owner must look to such third persons for a due discharge of all the duties incident to their relative situations, as in the

case of intermediate carriers, or shippers, wharfingers, &c., on delivery of the goods to whom the contract on the part of the carrier is entirely determined.

When a common carrier takes into his care a parcel directed to a particular place and does not by positive agreement limit his responsibility to a part only of the distance, that is *primâ facie* evidence of an undertaking on his part to carry the parcel to the place to which it is directed, although the place may be beyond the limits within which he ordinarily professes to carry on his trade. His responsibility therefore continues to the door of the address to which the goods are destined, and he cannot release himself from such responsibility by transferring the goods to another carrier or sending them by another conveyance;[393] and it makes no difference whether part of the carriage is by land and part by water and part by stage-coach.[394] If a railway company accept goods for conveyance to a particular destination beyond the limits of their own line of railroad, and receive one entire payment for the whole journey, and the goods are lost while in the hands of another railway company to whom they have been delivered to be forwarded on their journey, the first railway company are responsible for the loss, as being the parties contracting with the consignor or consignee for the conveyance of the goods.[395] But if the company limit their public profession of common carriers to their own line of railway, and under

take merely to forward goods to another company for further transit, and expressly receive the price of such further transit for the mere purpose of conveying the goods to such last-named company, they may exempt themselves from liability for loss, damage, or detention, after the goods have been delivered to the other carriers, and are no longer in their possession.[396]

Joint Consignors of Goods.—If several joint owners of goods deliver them to a carrier for conveyance, the carrier may deliver them according to the directions of or return them to one joint owner without the consent of all, in the absence of any agreement to the contrary.[397]

Public Notices of Carriers.—No public notice issued by a carrier which purports to limit the obligation or responsibility imposed upon him by law is valid unless it is signed by the sender of the goods or his recognised agent, and it then becomes a special contract.

A public notice issued by the Madras Railway Company, to the effect that 'the Madras Railway Company hereby give public notice that they will not be responsible for loss of or damage to grain after it has been unloaded from the company's waggons,' was held to afford no protection to the defendants on the ground that it was invalid as a regulation for non-compliance with Section 43 of the Railway Act of 1854, inasmuch as it had not been sanctioned by the local government.[398]

Termination of Liability as Carrier.—The liability

of a carrier ends as such when there has been an actual or constructive delivery of the goods to the consignee, or, failing such delivery, when the goods have been returned to the consignor, or are warehoused by the carrier for the convenience of the owner.

Where a person acts both as a carrier and as a warehouseman it is sometimes difficult to decide when his liability in the one character ceases and in the other character commences. If the carrier retain the goods in his possession, either under a contract or in accordance with the usual course of dealing between him and the owner, he may render himself liable as a warehouseman only, according to the circumstances of the case.[399] Where the carrier retains the goods in his possession, either expressly as a warehouseman or in respect of his lien for the carriage, he is bound whilst they are in his possession—even although he may have given notice to the consignee that he has warehoused the goods 'at owner's sole risk'—to keep them with reasonable care, and deal with them in a reasonable manner; and he is entitled to recover from the owner of the goods all reasonable expenses incurred by him in so doing.[400]

An important judgment on this question was delivered by the Court of Queen's Bench in 1880, on a point of law reserved at the trial before *Cockburn*, C.J., and a special jury at Bristol. It appeared at the trial that certain drapery goods were delivered to the defend-

ants, addressed to the plaintiff, a commercial traveller, and directed 'to be left till called for' at a station on the defendants' line of railway. The plaintiff had no residence or place of business near this station, and having inquired for the goods the day before they arrived he left the neighbourhood in pursuit of his employment. He called again at the station two days after the arrival of the goods, and found they had been destroyed that morning in the defendants' warehouse by an accidental fire.

At the trial the whole of the law applicable to the subject was considered, and the Court gave the following exhaustive decision in favour of the defendants.

Cockburn, C.J., delivered the judgment of the Court (*Cockburn*, C.J., *Lush* and *Manisty*, JJ.): 'These two cases depend on the same facts and involve the same point. The facts are not in dispute, and lie in a few words, but they give rise to a question of considerable importance. The plaintiff travels about the country with drapery goods. A package of such goods was delivered to the defendants, the Great Western Railway Company at Bristol, to be forwarded from thence by their line to their station at Wimborne. A second such package was delivered to the defendants, the London and North-Western Railway Company, to be forwarded from London to the station of the Great Western Company at Wimborne. Both were addressed to the plaintiff. Both were directed "to be left till

called for." The one from Bristol arrived on March 24, the one from London on the 25th. On their arrival they were placed in the station warehouse to await their being called for. They had not been called for when, on the morning of the 27th, a fire having accidentally broken out, the warehouse was burned down, and the plaintiff's goods were consumed. The plaintiff brings his action against both defendants on their liability as common carriers, contending that that liability still subsisted when the goods were destroyed. The plaintiff was aware that the goods were coming. He called on the 22nd to inquire after them, but found that they had not yet arrived. He called again in the course of the 27th, but the goods had been destroyed that morning by fire. The question is, whether the goods in question are to be considered as having been in the custody of the defendants as carriers, in which case the defendants would be liable for the loss, though not arising from any default of theirs, or as warehousemen, in which case they would be liable only for want of proper care, which is not alleged to have been the case here. The facts not being in dispute, it was arranged on the trial at Nisi Prius that a verdict should pass for the plaintiff for the value of the goods in each case, but that the question of law as to the liability of the defendants should be reserved for the decision of the Court on application for judgment. The question of where the liability of the carrier ceases, or rather

becomes exchanged for that of an ordinary bailee for hire, is sometimes one of considerable nicety, and by no means easy of solution. We are not, however, embarrassed in the present case by any consideration as to an undertaking to forward the goods, such as arose in *Garside* v. *The Trent and Mersey Navigation Company* (4 T. R. 582), or as to any obligation on the part of the company to give notice of their arrival, which was one of the points which arose in *Brown* v. *Gatcliffe* (3 M. & G. 643). It is plain that the delivery was to be made at the station to which the goods were addressed, and to the plaintiff himself or some one duly authorised on his behalf. Nor does any question arise as to the readiness of the defendants to deliver. The goods had arrived safely, and were ready for delivery had they been called for down to the time of the fire. It is not suggested that the defendants were under any obligation to give notice to the plaintiff of the arrival of the goods, nor indeed could they have done so. He was not a resident at Wimborne, nor did they know his address. He was going about the country on his business between the arrival of the goods and the time of their destruction. No evidence was offered at the trial of any prior course of dealing between the parties or of any established practice on the part of the railway company in dealing with goods addressed to and to be delivered at the station. We have therefore to consider the question with reference to general principles alone.

The contract of the carrier being not only to carry, but also to deliver, it follows that to a certain extent the custody of the goods as carrier must extend beyond as well as precede the period of their transit from the place of consignment to that of destination. First, there is in most instances an interval between the receipt of the goods and their departure, sometimes one of considerable duration. Next, there is the time which in most instances must necessarily intervene between their arrival at the place of destination and the delivery to the consignee, unless the latter, which, however, is seldom the case, is on the spot to receive them on their arrival. Where this is not the case, some delay, often a delay of some hours, as for instance when goods arrive at night, or late on a Saturday, or where the train consists of a number of trucks which take some time to unload, unavoidably occurs. In these cases, while on the one hand the delay being unavoidable cannot be imputed to the carrier as unreasonable, or give a cause of action to the consignor or consignee, on the other hand the obligation of the carrier not having been fulfilled by the delivery of the goods, they remain in his hands as carrier, and subject him to all the liabilities which attach to the contract of a carrier. *A fortiori* will this be the case where there is unreasonable delay on the part of the carrier if the consignee is ready to receive. The case, however, becomes altogether changed when the carrier is ready to deliver, and the delay in the delivery

is attributable not to the carrier, but to the consignee of the goods. Here, again, just as the carrier is entitled to a reasonable time within which to deliver, so the recipient of the goods is entitled to a reasonable time to demand and receive delivery. He cannot be expected to be present to receive delivery of goods which arrive in the night time or of which the arrival is uncertain, as of goods coming by sea or by a goods train the time of the arrival of which is liable to delay. On the other hand he cannot for his own convenience or by his own laches prolong the heavier liability of the carrier beyond a reasonable time. He should know when the goods may be expected to arrive. If he is not otherwise aware of it, it is the business of the consignor to inform him. His ignorance, at all events where the carrier has no means of communication with him, which was the case in the present instance, cannot avail him in prolonging the liability of the carrier as such beyond a reasonable time. When once the consignee is *in morâ* by delaying to take away the goods beyond a reasonable time, the obligation of the carrier becomes that of an ordinary bailee; being confined to taking proper care of the goods, as a warehouseman he ceases to be liable in case of accident. What will amount to reasonable time is sometimes a question of difficulty, but is a question of fact not of law. As such it must depend on the circumstances of the particular case. Such being the general rule, it is, of course, competent to the parties

to modify the contract by the introduction of any terms or conditions they may please. The question arises whether they have done so, and, if so, to what extent in the present instance. The goods were specially directed "to be left till called for." What is the meaning of these words? What effect, if any, have they on the contract as affecting the liability of the defendants? In our opinion, none. They amount to no more than an intimation to the carrier that the goods are not to be delivered elsewhere, but will be fetched from the station. They are words which have been in use and had their origin in former times when the carrier generally had his office in the town to which he carried, and was in the habit of delivering at the house or place of business of the person to whom goods were addressed. To prevent goods which it better suited the convenience of the consignee to receive at the office of the carrier, more especially when he had no residence or office at the particular place, from being sent out for delivery and possibly misdelivered, and to insure their being kept at the office of the carrier ready for delivery, they were specially so addressed. There are still places at which railway companies send out goods from the station. The consignors of the goods now in question were probably unaware whether the defendant company did so at Wimborne or not. They no doubt knew that the plaintiff did not reside or carry on business there, except in passing. They were probably aware that he was

going about the country with his goods, and that it was uncertain at what precise moment it would suit him to receive them. They therefore directed them to be left at the station till called for, obviously for the plaintiff's convenience, not for that of the company. No doubt some effect must be given to the words. Having contracted to carry the goods subject to the conditions of keeping them till called for, the company would be bound to keep them, possibly not for an indefinite, but at all events for a reasonable, time. But in what capacity? As carriers or warehousemen? In our opinion no change in the conditions and liability is introduced by these words. It would be in the highest degree unreasonable that the company, having agreed to keep the goods for the convenience of the owner, should be saddled with a more onerous liability than would otherwise have attached to them. It cannot be supposed that they undertook to keep the goods till it suited the convenience of the plaintiff to take them away, with the intention of prolonging their responsibility throughout the time, whatever it might be. In our opinion, as soon as a reasonable time for delivery had passed, the defendants were fully entitled to treat their responsibility as carriers as at an end, and as exchanged for that of warehousemen. This brings us to the question of what under the circumstances would be a reasonable time from the fire happening on the morning of March 27. One of these packages had been lying at the station

since the 24th, the other since the 25th. If the plaintiff, who expected these goods, had called for them on the 26th, and had not had them delivered to him, and had sustained a loss in consequence, he would have had a good ground of complaint against the company, inasmuch as they would have had full time to unload the goods, and to have them ready for delivery. The reason he did not do so was that he was following his business elsewhere, but for which he would have fetched his goods away. It seems to us that there must be a corresponding obligation on his part, and that he was consequently *in morâ*, and must put up with the loss as resulting from his own delay instead of throwing it on the company. This view of the case receives support from the decision of the Court of Common Pleas, in *Re Webb* (8 Taunt. 443), which in principle is quite analogous to the present case, though the facts are not precisely the same. There the defendants, the carriers, in order to obtain the exclusive custom, had agreed with the plaintiffs to store all the goods arriving for them in the defendants' warehouse free of charge till it suited the plaintiffs to take them away. A fire having accidentally broken out, and the goods of the plaintiffs, which had been lying in the defendants' warehouse upwards of a month, having been destroyed, it was held that the goods, having been in the keeping of the defendants for the convenience of the plaintiffs, the former were not liable for the loss. Here, too, the goods were equally

in the keeping of the defendants for the convenience of the plaintiffs, and the same result must ensue.'[401]

In the case of *Suratram Bhayia* v. *Great Indian Peninsular Company* the High Court of Madras ruled that it is the duty of a railway company to keep goods at their destination ready for delivery until the consignee in the exercise of due diligence can call and remove them, and it is the duty of the consignee to call and remove them within a reasonable time.[402]

Carrier's Special Property in Goods carried.—In virtue of the delivery of the goods the carrier acquires a special property in them, and if a third person wrongfully deprives him of the possession of the goods or does them any injury, the carrier is entitled to use such remedies as the owner might have used in like case, and either he or the owner may bring a suit against a third person for such deprivation or injury.

This right arises from the carrier's general interest in conveying the goods, and his responsibility for any loss or injury to them during their transit, and having once acquired the lawful possession of the goods for the purpose of carriage, the carrier is not obliged to restore them to the owner again, even if the carriage be dispensed with, except upon being paid his due remuneration; for by the delivery to him he has already incurred risk.[403]

Gratuitous Carriers.—The contract of a person who contracts to carry goods *gratuitously* is *nudum pactum*,

and no action can be maintained against him for omitting to do so. But if he enter upon the possession of the goods, the acceptance of the trust imposed in him is a sufficient consideration, and, like other bailees who come within Chapter ix. of the Contract Act, he is bound to take as much care of the goods as he would of similar property of his own; and if his situation or profession be such as to imply skill, an omission to use that skill is imputable to him as negligence.

Sir William Jones, in his work on bailments, puts the case of gratuitous bailees' liability thus: 'If Stephen desires Philip to carry a diamond ring from Bristol to a person in London, and he put it with banknotes of his own into a letter-case out of which it is stolen at an inn, or seized by a robber on the road, Philip shall not be answerable for it, although a very prudent or careful man would have kept it in his purse at the inn and have concealed it somewhere in the carriage. But if he were to secrete his own notes with peculiar vigilance and either leave the diamond in an open room or wear it on his finger in the chaise, I think he would be bound in case of a loss by stealth or robbery to restore the value of it to Stephen.'

In *Hutton* v. *Osborne*, the defendant had undertaken to carry a hare for the plaintiff from A. to B., but carried the same so negligently that he lost it by the way. It was objected by the defendant's counsel that the plaintiff had not declared on the general custom of

the realm relating to carriers, and therefore the defendant must be taken to be a private person; if so, there was not any consideration laid, and consequently the promise was merely *nudum pactum*. *Probyn*, J., and *Reynolds*, J., the only judges in Court, admitted that the defendant must be taken to be a private person, but it was determined in *Coggs* v. *Bernard* that a private person was answerable if he undertook the carriage of goods for a misfeasance, though there was not any consideration, and the only difference was that a common carrier was obliged to undertake the carriage of goods and a private person was not, but if a private person voluntarily undertook it he was by law answerable for damage arising from his negligence, and accordingly gave judgment for the plaintiff.[404]

In *Nelson* v. *Mackintosh*, it appeared that the plaintiff came on board a ship of which the defendant was captain, with the intent to work his passage home from Trinidad to London, but being on shore when the vessel sailed was left behind. His trunk was stowed with others on the quarterdeck, and soon after the departure of the ship was opened by the defendant on the suggestion that it might contain contraband goods. The box was fastened with a lock, and the lid was also nailed down; it was found to contain money and other valuables, and was then fastened down again. Towards the end of the voyage the defendant again opened the trunk, and the contents having been put into a bag were

deposited in the defendant's own chest in the cabin in which his own valuables were generally kept. Upon the ship's arrival at Gravesend the defendant left the ship, and while away his chest was stolen by persons unconnected with the ship. Lord *Ellenborough*, in summing up, said: 'Every person who delivers goods to another to be carried for hire has a right to the utmost care; the carrier stands in the situation of an insurer, and is liable for all losses except those which are occasioned by the act of God or of the King's enemies, and where a person does not carry for hire he is bound to take proper and prudent care of that which is committed to him. Such would have been the situation of the parties if no alteration had been made in the state of the box, but when the captain from motives of prudence opened the box he was bound to intermeddle so as to replace it in its former state of security, and to restore all the guards with which it had before been protected.'[405]

Demurrage—Wharfage.—A charge for demurrage is in the nature of extended freight, and where a carrier by his published rules declares that all goods not removed from his premises within a specified and reasonable time shall be subject to a demurrage charge, the consignee is legally bound to pay such charge as incidental to the contract for the carriage of the goods. The carrier's duty is determined by the carriage of the goods to their destination, and, if for the convenience of the consignee

he warehouses them, he is entitled to remuneration for the additional service rendered.

Carriers by railwáy are specially empowered by law not only to levy a charge for demurrage or wharfage, but also to sell the goods in satisfaction of their lien for such charges after due notice to the persons interested.[406]

If there be no usage to the contrary, and no express exclusion of them, Sundays must be included in the calculation of days mentioned in a rule or contract stipulating for demurrage, and not describing them as working or running days; but it is the custom generally to exclude Sundays and holidays.[407]

PART IV.

CARRIERS OF GOODS IN SHIPS.

CHAPTER XII.

OF THE DUTIES AND RIGHTS OF MASTERS AND OWNERS.

Chartered and General Ships.—When ships are employed for the carriage of goods, they are either chartered ships or general ships. A ship is said to be *chartered* when the whole of it or some principal part of it is let to a merchant for the conveyance of goods on a determined voyage to one or more places, in which case the rights, duties, and liabilities of the parties depend upon the terms of the express contract entered into between them, and the masters and owners are not viewed in the light of carriers. It is simply the letting of the ship for hire for the particular voyage indicated by the charterer. A ship is called a *general* ship when it is destined for a particular voyage, and the owners and masters engage separately with

various merchants unconnected with each other to convey their respective goods to the place of the ship's destination, or in other words to carry goods for all persons indiscriminately.

When the owner of a ship usually freights it himself or lets the tonnage of it with a small exception to a single person, the fact that for the accommodation of a particular individual he takes goods on board for freight to fill any space that may be vacant does not convert the ship into a general ship, nor does the owner thereby become a public carrier.[408]

It is not intended in this work to treat to any extent upon the species of contract known as charter-party, which more properly appertains to the law of merchant shipping than to that of carriers, but it is necessary to notice briefly the law on the subject in order to distinguish it from that which applies to contracts of common carriers in ships.

Contract by Charter-party.—The word 'charter-party' is a corruption of the Latin word *charta-partita*; the two parts of this and other instruments of the kind being in former times usually written on one piece of parchment, which was afterwards divided by a straight line cut through some word or figure so that one part should fit and tally with the other.

The contract of charter-party is an express contract under which a ship is let to a merchant for the conveyance of goods on a fixed voyage to one or more

places; and a ship may also be chartered to be employed in warfare, or in the fishing, coasting, or other trade, under the entire management of the hirer; or by way of mortgage, reserving at least a temporary right of management to the letter; or one part-owner may let his share to another.[409]

Stipulations in Charter-party.—The customary stipulations on the part of the shipowner or master are, that the ship shall be tight and staunch, and well equipped and manned, and furnished with all the necessaries for the voyage, that she shall be ready by a day appointed to receive the cargo, and shall wait a certain number of days to take it on board, and after lading shall sail with the first fair wind for the destined port, and there deliver the goods in proper condition to the charterer; and further, that during the continuance of the voyage the ship shall be tight and staunch, and furnished with sufficient men and necessaries, to the best of the owner's endeavours.

The charterer usually covenants to load the ship after she shall be ready to receive her cargo, and unload her within a certain number of days, and to pay freight at so much per ton according to the tonnage of the vessel, or according to the quantity of goods actually shipped on board, or according to the time of the ship's employment. *Primâ facie*, the law of the place where a contract is made is that which the parties are to be presumed to have adopted, and such law ought to pre-

vail in the absence of circumstances indicating a different intention. But a contract of affreightment made between a charterer and an owner of different nationalities in a place where they are both foreigners may under some circumstances be construed by the law of the nation to which the ship belongs.[410]

When the Contract operates as a Demise or Bailment of the Ship.—Although the shipowner, by the charter-party, expressly grants the vessel to be used by the charterer, the contract does not amount in general to a demise or bailment of the ship, but simply to a contract for the use of the ship, together with the services of the master and crew for the conveyance of merchandise. If however the nature of the service sought to be accomplished require the vessel to be absolutely under the control of the charterer, if she is to be employed in warfare, or in the fishing and coasting trade, or as a general ship for the conveyance of merchandise by the charterer for third parties, and is to be at the general disposal of the latter to sail upon any service that he may require, the contract operates as a demise of the ship.[411]

Position of Carriers in Ships.—Carriers of goods in ships are common carriers, or bailees for hire according to the nature of their public profession and the contract under which they carry. If they profess to carry property from place to place for all persons indis-

criminately, they are common carriers so far as their duty to the public is concerned.

Position of Master.—A trading ship is seldom navigated by the owners themselves but by the master, who is considered as the servant or agent of the owners, and the latter are bound by any contract made by him, relative to the usual employment of the ship. The master himself is also liable upon the contracts entered into by him, and a person who has a right of action against the owners may sue either the owners or master at his election.[412]

Duties of Carriers in Ships.—The first duty of the owners of a ship employed in the carriage of goods is to see that at the commencement of the voyage she is in a proper condition to perform it, and fit for the employment for which she is offered to the public or to the charterer. Sufficient stores must be on board, and the anchors and chain cables must be of a proper description and fit for service;[413] nor is it any excuse for the unseaworthiness of the ship that the owner has been himself deceived by the shipbuilder or repairer, and is ignorant of the defect.[414] If a ship chartered or freighted for a particular voyage becomes unseaworthy after the commencement of the voyage, it is the duty of the master, as between the owner and the freighter, either to repair if he has the opportunity, or at least not to proceed on the voyage in an unseaworthy state.[415]

The owners are bound, not only to the charterers and to each other, but also to all whose lives or property may be embarked in the ship, to select a master and crew of competent skill.[416]

When on a voyage from Mauritius to London, there was no one on board competent to officiate for the captain, who was ill, Lord *Tenterden*, in an action on a policy of insurance, held the underwriters to be discharged on the ground that the vessel was not fit for the voyage.[417]

Duty to receive and carry.—Common carriers by ships are bound by the same rules and upon the same principles as those which attach to carriers by land to carry all goods offered to them for carriage, and are liable to an action for not receiving and carrying goods, unless they can show a reasonable ground for refusal. Carriers in ships may refuse to receive or carry goods unless the price of carriage be prepaid, if they insist upon such prepayment, which it is sometimes usual for them to do. They will also be excused from carrying if they have not sufficient accommodation, or if the goods are of a nature which they do not hold themselves out to carry, or are of such great value that they have not the means of carrying them securely, or they are brought to be carried at an unreasonable time, or if the carriers are not ready to engage in their transit.[418] So the masters and owners of ships may refuse to receive or carry goods if they are of such a nature as would

endanger the safety of the ship in which they are to be carried, or other portions of the ship's cargo.[419]

Delivery of Goods to Carrier.—The manner of taking goods on board depends on the custom of the particular place of shipment: more or less has to be done by wharfingers or lightermen, and the rules and regulations of the port must be observed. The defendant chartered the plaintiff's vessel to proceed to Newcastle-on-Tyne, and there be ready forthwith 'in regular turns of loading' to take on board by spout or keel, as directed, a complete cargo of coal and coke:—*Held*, in an action for not loading the vessel within a reasonable time, that evidence was admissible to explain the meaning of the expression in the charter-party, 'in regular turns of loading,' by showing that there was an usage at the port of Newcastle that vessels should take in their cargoes of coke in certain regular order or turn, and that the question whether the vessel was loaded within a reasonable time ought not to be decided without reference to such usage.[420]

Where the master receives goods at a ghaut, quay, wharf, or on the beach, his responsibility commences with the receipt of them, and in the same manner when the goods are delivered on board his vessel by a boatman, wharfinger, or lighterman.[421] Once there has been a sufficient delivery, the masters and owners of the ship will be answerable for the loss of the goods, though they may not have been guilty of any default in respect of

them, where, by the *lex loci contractûs*, such masters or owners are subject to the common-law rule, which holds common carriers liable as insurers against all events, except the act of God and the Queen's enemies.[422]

Mate's Receipt.—It is usual for the master and mate to sign a receipt for the goods at the time of the shipment. When this is done, the master must take care not to deliver a bill of lading until the receipt is returned to him; for otherwise he may place himself under a twofold responsibility—a responsibility to the shipper in case he shall require the goods to be delivered to his own order, and a responsibility to a holder of the bill of lading, who may be induced to purchase the goods on the faith of it.[423] If such a receipt is not given, still the master must take care not to deliver a bill of lading to any person but the shipper without his orders.[424]

It is of course no delivery to the carrier if goods are surreptitiously put on board a vessel without his knowledge or consent; but if such goods have been carried in the ship, the master is entitled to freight for them.[425]

It is the duty of the owners to receive the cargo which they have contracted to carry, and to find proper ballast for the ship. Questions have frequently arisen as to whether a freighter who has contracted to load a full cargo, which is to consist partly of light and partly of heavy goods, is bound to load heavy goods, which, by

supplying the place of ballast, would enable the ship to earn more freight. This depends upon the intentions of the parties, and unless there be some express or implied stipulation, or some custom of the trade to the contrary, the freighter may ship what goods he likes, and the shipowners must provide proper ballast.[426] Merchandise may, however, be taken on board a chartered vessel as ballast, if it do not occupy more space than the ballast would have done.[427]

Loading Cargo, Dunnage, Stowage.—The next duties which devolve upon the master after receiving goods on board are to load and stow them in the ship. He must be prepared with the necessary tackle for shipping, and with *dunnage*, *i.e.* loose pieces of wood placed on the bottom and against the sides of the vessel, to preserve the cargo from the effects of leakage, according to its nature and quality—and care must be taken by him, unless the shipper by custom or contract undertakes the work, so to stow and arrange the different articles of which the cargo consists that they may not be injured by each other or by the motion and leakage of the ship.[428] More cargo must not be taken on board than the ship can conveniently carry, leaving room for her own furniture, the provisions of the crew, and for the proper working of the vessel.

Duty to sail without Delay.—Having received the goods on board and complied with the requirements of the port, as to papers, clearances, &c., the master must

commence his journey without delay as soon as the weather is favourable, but he must on no account sail out during tempestuous weather.[429]

Sailing with Convoy.—If there has been an undertaking or warranty to sail with convoy, the vessel must proceed to the place of rendezvous for that purpose, or the masters and owners will be liable to the shippers if the goods be lost, in consequence of the ship sailing without the convoy and being captured by an enemy.[430]

Deviation.—The master having set sail must proceed upon his voyage in the direct, shortest, and usual route, unless there has been any express contract as to the course of the voyage. And when a ship has been advertised for a particular voyage, if that be altered, notice of the alteration should be given to all persons who may afterwards ship goods on board, as the owners will be liable for any loss that may be occasioned to the shipper by being led to suppose that the destination of the ship remains unaltered.[431]

Transhipment of Cargo.—It must be considered that the first duty of a master is to carry his cargo to its port of destination in his own ship ;[432] but if by reason of the damage done to the ship, or from want of necessary material, she cannot be repaired at all, or not without very great loss of time, the master is at liberty to procure another ship to transport the cargo to the place of destination.[433] Where a master has a reasonable opportunity, according to the circumstances

of the case, of communicating from the port of distress with the owners of the cargo, and receiving directions from them, it is his duty to endeavour to obtain such directions.[434]

If a ship by perils of the sea is so much damaged as to be incapable of repair so as to prosecute the adventure except at an expense exceeding its value, together with the freight, when repaired, the master is justified in abandoning the voyage, and is not bound as agent of his owner to send the goods on in another bottom.[435]

When a vessel is injured during the voyage and is compelled to put into a port of refuge, then the master is allowed a reasonable time, either to repair and carry on or to tranship. If he declines to do either, he may be called upon to deliver without payment of any freight; but before a reasonable time has elapsed he cannot be required to deliver, except on payment of full freight or waiver thereof.

If the master is prevented from carrying the cargo to its destination by the act or default of the owner, he has a possessory lien on the cargo for the entire freight, and for contribution to any general average expenses incurred, and may refuse to unload or tranship the goods until it is satisfied.[436]

Sale of Cargo.—It remains to be considered what are the master's duties with respect to the cargo when his own vessel is wrecked or disabled during the voyage,

and he is unable to carry the goods further or forward them in any other ship.

In such cases where the sale of the cargo is directly or indirectly for the benefit of the shipper, the master of the vessel becomes his agent *ex necessitate rei* for the purpose of selling the cargo. If the goods be of a perishable nature and there be not time nor opportunity to consult the shipper or the consignee, he ought to either tranship or sell them according as the one or the other will be the most beneficial to the owner.[437] But as regards goods not of a perishable nature, a sale by the master would not in all cases be justifiable—one thing may be fit to be done with fish or fruit, another with timber or iron; one mode of proceeding may be proper in distant regions, another in the vicinity of the merchant; one in a frequented navigation, another on unfrequented shores.

The disposal of the cargo by the master is a matter which requires the utmost caution on his part. He should always remember that *it is his principal duty to convey it to the place of destination.* This is the purpose for which he has been entrusted with it, and this purpose he is bound to accomplish by every reasonable and practicable method. Every act that is not properly and strictly in furtherance of this duty is an act for which both he and his owners may be made responsible: and the law of England does not recognise the authority of any tribunal, or officer acting

upon *his* suggestion or at *his* instance, but will scrutinise their acts as well as his own.[438]

A cargo of opium, shipped at Calcutta, was by the bill of lading to be delivered at Hong Kong. The ship came in collision at sea with another vessel, and received so much injury as to compel her to put in at Singapore, where the cargo was found to be partially damaged by salt water. The master, who acted *bonâ fide* and to the best of his judgment, selected the damaged chests of opium, and sold them by auction and forwarded the remainder to Hong Kong. The master might have had the damaged opium redried and repacked while the vessel was refitting, and have forwarded it, though deteriorated in value, with the other opium :—*Held*, that it was the duty of the master to carry the cargo to its place of destination, and as the goods could have been delivered in a merchantable although in a damaged state the owner of the ship was liable.[439]

The wreck of the ship is not necessarily followed by an impossibility of sending the goods forward, and does not of itself make their sale a measure of necessity or expediency; much less can the loss of the season or of the proper course of the voyage have this effect. Many circumstances may excuse the master from completing the voyage or delivering the goods at their place of destination, but a sale of cargo should be the last resource.[440]

The master should consider whether a deposit of the goods or a return of them to the port of shipment may not be more beneficial to the merchant than a sale; and if the master should convey the goods back to the port of destination, it seems that he would be entitled to compensation for so doing.[441]

Hypothecation of Cargo.—The master may hypothecate the whole cargo, or sell a part of it for the expense of necessary repairs to his vessel in a foreign port during the voyage, if he cannot otherwise raise the money; and if the ship reach the place of her destination, the owner of the goods will be entitled to receive the clear value which the goods would have realised there; or if part of his goods have been sold, he may take the sum which they realised, and deduct that sum from the amount payable for the freight of his other goods. But a hypothecation of the cargo is not an absolute sale of the goods; it imports a pledge of the goods without immediate change of possession, and the owner of them has, on repayment at the stipulated time of the advances made, a right to take his goods; and any contract made by the master in opposition to this right is not binding.[442]

Bills of Lading are instruments signed by a master of a ship or his agent, acknowledging the receipt of goods therein described, and undertaking to deliver them at a port and to a person therein mentioned or indicated.

When the use of an entire vessel, or a certain amount of stowage therein, is not contracted for, but the merchant or owner of the goods merely sends certain parcels or packages of goods on board, to be conveyed to their port of destination, the master of the vessel, or some person acting for him, usually gives a receipt for them, and the master afterwards signs and delivers to the merchant sometimes two and sometimes three parts of a bill of lading, of which the merchant commonly sends one or two to his agent, factor, or other person to whom the goods are to be delivered at the place of destination: that is, one on board the ship with the goods, another by post or other conveyance, and one he retains for his own security. The master who thus acknowledges the receipt of the goods, and promises to carry and deliver them, is personally responsible for the fulfilment of his engagement; and the shipowner or charterer who receives the freight and earnings of the ship, is also liable upon the bill of lading, although he is not named therein.

The duty to deliver the goods under a bill of lading arises on presentment of the bill; and if it is not presented to the master on the arrival of the ship at her destination, the master is not bound to keep the goods for an indefinite time on board his ship, but may deliver them to any trustworthy person, to be kept until the bill of lading is presented. A bill of lading signed by the master is not conclusive proof of the actual

shipment of the goods mentioned therein, except as against the consignee or assignee under a bill of lading without notice, unless in the case of fraud. The consignee has no right to deduct from the freight payable on delivery of goods the value of articles which, though mentioned in the bill of lading, turn out not to have been put on board.[443]

The person who first receives the bill of lading (though only one of a set of three) gets the property which it represents; he need not do any act to assert his title, which the transfer of the bill in itself renders complete, and any subsequent dealings with the others of the set are subordinate to the rights passed by that one. Though the shipowner or wharfinger, having no notice of the transfer of one bill of lading, may be excused for delivering the goods to a person who produces to him another which has in reality been subsequently taken, that does not affect the legal ownership of the goods as between the holders of the two bills of lading.[444]

When the goods are at sea, the parting with the bill of lading, which is the symbol of the goods, is parting with the ownership of the goods themselves, and the same principle applies to goods which have been landed at a sufferance wharf. As long as the engagement of the shipowner has not been completely fulfilled, the bill of lading is a living instrument, and the transfer of it for value passes the absolute property in the goods,

but the engagement has not been fulfilled when the goods are subject to a stop order.[445]

A shipowner may be liable on a bill of lading which has been signed by some other person than the master of such ship; and therefore where a bill of lading had been signed by the charterers of the ship, not on their own behalf, but as agents for the shipowner, and with his authority, the shipowner was held liable thereon to the owner of the goods shipped under such bill of lading for damage by negligent stowage, such damage not being one of the excepted risks mentioned in the bill of lading, and the shipper of the goods having no notice of the charter-party until after the goods had been damaged.[446]

In the absence of express words to the contrary, a bill of lading implies a warranty of seaworthiness, and all the exceptions in it must be taken to refer to a period subsequently to the sailing of the ship with the goods on board.[447]

CHAPTER XIII.

FREIGHT.

Freight is defined to be the price payable for the carriage of goods from the port of lading to the port of discharge, and in ordinary cases is not payable before the completion of the voyage and the carriage of the goods to their destination, but the carrier has an undoubted right to demand that it shall be prepaid, and may decline to receive and carry goods unless it is so paid. If the hire be prepaid and the voyage be not completed, or the goods not delivered at their destination, this prepayment may, except under certain circumstances, be recovered back from the carrier.[448]

As a general rule, no right to freight attaches until the ship has broken ground; when she begins to move she begins to earn her freight. This rule is intended to prevent the delay which would otherwise probably be created if the freight commenced sooner, but is more applicable to cases of ships chartered at a freight payable by time than to general ships, though where goods are shipped on board the latter the rule would

apply where there is any claim to have the freight apportioned.[449]

In ordinary cases no freight is due until the voyage is completed and the goods are ready to be delivered; but there are cases in which the shipowner may be entitled to a recompense in the nature of freight, though the goods have not reached their destination, and are not capable of being delivered. As if the master be obliged during the voyage to sell a portion of the goods in order to obtain victuals or repairs for his ship, his owners are liable to the merchants for the price the goods would have produced at their destination, and are therefore allowed to charge the merchant the freight which would have been due if the goods had been conveyed there. Or if part of the cargo be necessarily thrown overboard for the preservation of the ship,[450] and the ship with the remainder of the cargo afterwards arrives at her destination, the value of this part is to be answered to the merchant by way of general average, and the freight thereof allowed to the master.[451]

Where the agreement is to pay a certain sum per cask or bale of goods, the payment must be according to the number of casks or bales shipped and delivered. And if the freight be payable on skins by the pound, net weight at the Queen's beam freight is due on the outside skins in which the packages are contained.[452]

In the absence of any special stipulations in the bill

of lading, the freight is due for that quantity of goods which has been carried for the *whole* voyage. In *Gibson* v. *Sturge* the facts were that a cargo of 2,664 quarters of wheat in bulk were shipped at Odessa for Gloucester, and the master signed bills of lading in the usual form, describing the wheat as of that quantity, but the bill of lading also contained a memorandum 'quantity and quality unknown,' and during the voyage a portion of the wheat from some unknown cause became heated and damaged, whereby its bulk was increased, so that on the arrival of the vessel at Gloucester the cargo was measured at the Queen's beam, and found to contain 2,785½ quarters. A question arose as to whether the master was entitled to freight upon the quantity of wheat shipped on board at Odessa, or that delivered at Gloucester, and it was held by the Court of Exchequer that the freight was payable on the quantity shipped, and not on that delivered.[453]

If goods, as in the case of molasses or tallow, have wasted in bulk during the voyage, freight is payable only for the quantity which arrives at the port of destination.[454]

The master has a right to his freight although the goods may have been damaged during the voyage, provided the merchant takes them. It is enough if the master has carried them, for by doing so he has earned his freight and the merchant must take all or none. He cannot be allowed to pick and choose what

he likes, taking that which is not damaged and leaving that which is spoiled and damaged. If he abandons the goods he is excused freight, and he may abandon all though they are not all lost or injured.[455]

There are cases in which the freight may be apportioned, as where the ship, having performed the whole voyage, has brought a part only of the goods to their place of destination. Where, in a general ship, freight is payable according to the quantity of the goods, freight is due for so much as shall be delivered, the contract in such a case being divisible in its nature, if not distinct.[456]

When, in consequence of an accident, goods are transhipped into another vessel to be forwarded, the master has no right to any freight, if the goods are not so forwarded, unless the forwarding them be dispensed with by the owner, or unless there be some new bargain upon this subject. If the master will not forward them, the freighter is entitled to them without paying anything. One party, therefore, if he forward them, or be prevented or discharged by the owner from so doing, is entitled to his own freight, and the other, if there be a refusal to forward them, is entitled to have them without paying any freight. The general property of the goods is in the freighter, and the shipowner has no right to withhold the possession from him, unless he has either earned his freight or is going on to earn it. If no freight be earned, and he declines proceeding to

earn any, the freighter has a right to the possession of the goods.[457]

If the master be willing to forward the goods, but the owner of them intentionally dispenses with his doing so, and prefers having them delivered to him at the place where they then are, to which the master assents, and the owner of the goods, under such circumstances, voluntarily accepts the goods from the master, this is evidence from which a new contract to pay for the services already rendered may be inferred; and where a ship freighted to Hamburg was prevented, by restraint of princes, from proceeding there, and the consignees directed the master to deliver the goods at Glückstadt and accepted them there, it was held that the master might sue upon an implied contract to pay freight *pro ratâ itineris*.[458]

To raise an inference, however, of a new contract to pay freight *pro ratâ itineris*, the acceptance of the goods must be voluntary, and therefore, where, in order to prevent a tortious sale by the master under a claim for freight and expenses, goods were taken possession of by the agents of the consignees, and sold by consent of but without prejudice to the rights of the parties, it was held that there was not any acceptance of the goods from which a new contract could be inferred to pay any compensation for the portion of the voyage which had been performed and for the detention of the ship.[459]

Where goods damaged on the voyage are landed at

an intermediate port and sold without the assent of the owner, the shipowners are not entitled to freight *pro ratâ itineris*.

Freight was payable by the terms of a charter-party upon delivery of cargo at port of destination. The ship meeting with damage from heavy weather the master at an intermediate port justifiably sold part of the cargo shipped by the charterer, in order to raise funds for the necessary repairs. The cargo so sold realised more than it would have done if carried to the port of destination :—*Held*, that the shipowner was not entitled to freight *pro ratâ itineris* upon the cargo sold.[460]

Where transhipment has been found necessary and the goods have been forwarded by another vessel to destination, the freighter is bound to pay the whole freight although the master has consigned the goods under fresh bills of lading in the second vessel to his own agent, and the freight for the latter part of the voyage is at a much lower rate than that originally contracted for. If the freight by the second vessel should exceed that contracted for by the original bill of lading, the freighter would be liable for the additional freight also.[461]

Who is liable to pay Freight.—The receipt of goods by a general shipowner under the usual bill of lading (by which it is expressed that they are to be delivered to the consignee or his assigns, he or they paying freight for them) is evidence of a contract by a person so receiv-

ing them to pay the freight due upon them.[462] There is no assignment of contract, no shifting of liability. The receiver of the goods is an original contractor to pay the freight of them. In like manner a course of dealing between parties may be evidence of such an engagement.[463] But no such contract can be implied against a consignee who, not having himself received the goods, has by endorsing the bill of lading enabled his endorsee to receive them. The consignee is *primâ facie* the owner of the goods, but if he be not so he is not liable *simpliciter* as consignee except on a new contract to pay the freight. But if the goods have always been delivered on payment of freight by the defendant, that is evidence that in the particular case he agreed to pay it.[464]

A person who is only an agent of the consignor, and known to the master as such, does not make himself personally answerable for the freight by receiving the goods, although he may enter them in his own name in the Custom-house.[465]

If the indorsees of a bill of lading obtain goods not under the bill, but under an order of the consignees, this is not sufficient to imply a promise on the part of the indorsees to pay the freight in the absence of proof of usage to the contrary.[466]

Though freight may not be payable in respect of a man's own goods conveyed in his own ship, it becomes so if he makes third persons the consignees of the

goods, and the goods are by a bill of lading deliverable to their order.[467]

Back Freight.—A ship with a general cargo sailed from London to Havre with some petroleum on board. The authorities at Havre refused to allow the ship to remain at Havre on account of the petroleum. Thereupon the ship was taken to neighbouring ports but was not allowed to remain at any of them. It then returned to Havre and discharged its general cargo, but no bill of lading having been presented for the petroleum it was brought back to London:—*Held*, that the shipowner was entitled to freight, back freight, and expenses, as although the petroleum could not be landed at Havre, it was in the port a reasonable time, during which the owner might have received it, and the freight was accordingly earned.[468]

When a ship is abandoned by her crew, the contract between the shipowner and the owners of the cargo is put an end to, and if the vessel and cargo afterwards be saved the shipowner is not entitled to freight.[469]

Freight on Illegal Voyages.—Freight is the reward which the law entitles a person to recover for bringing goods lawfully upon a legal voyage. If the voyage be illegal by reason of the goods being contraband, or any other cause, freight cannot be recovered.[470]

Primage.—By the bill of lading freight is payable with primage. The word primage denotes a small payment to the master for his care and trouble, which he

is to receive to his own use, unless he has otherwise agreed with his owners. This payment appears to be of very ancient date, and to be variously regulated in different voyages and trades. It is also sometimes called 'the master's hat money.'[471]

Average—Jettison.—Average is defined as the contribution that is to be made by all parties towards a loss sustained by some for the benefit of all; this contribution is sometimes called by the name of *general* average, to distinguish it from *special* average, a very incorrect expression used to denote every kind of partial loss or damage happening either to the ship or cargo from any cause whatever; and sometimes by the name of *gross* average, to distinguish it from *customary* average, mentioned in the bill of lading, which latter species is likewise called *petty* average.

The principle of this general contribution was adopted in the Institutes of Justinian from the ancient maritime law of Rhodes, and has since been recognised as a sound rule of law by all maritime nations.

The rule of the Rhodian law is this: 'If goods are thrown overboard in order to lighten a ship, the loss incurred for the sake of all shall be made good by the contribution of all.'[472] The goods must be *thrown* overboard; the mind and agency of man must be employed: if the goods are forced out of the ship by the violence of the waves, or are destroyed in the ship by lightning or tempest, the merchant alone must

bear the loss. They must be thrown overboard *to lighten the ship* when in danger of perishing from the violent agitation of the wind, or from the quantity of water that may have forced a way into it, or it is labouring on a rock, or a shallow, upon which it may have been driven by a tempest; or when a pirate or an enemy pursues, gains ground, and is ready to overtake it.[473]

Petty average denotes several petty charges, which are to be borne partly by the ship and partly by the cargo, such as the expense of towage, beaconage, &c. These charges depend upon usage, and with primage are often commuted for a specific sum, or a certain percentage on the freight.[474]

Demurrage is a term used to express a sum of money agreed to be paid for the detention of the vessel by the shipper or owner of goods at the port of shipment or destination after the expiration of the time allowed for the loading or unloading of the vessel by the consignor or consignee. When there is a charter-party, there is generally an express stipulation as to the number of days allowed for unloading and loading the vessel, and that the merchant shall be allowed to detain the vessel a further specified time for such purpose on payment of a sum per day agreed upon between the parties.

In a general ship the bill of lading usually contains in the margin, or at the foot of it, a memorandum

stipulating that the goods shall be taken out of the vessel within a certain time, or in default thereof the ship shall remain in demurrage at so much per day, and under this memorandum the consignee or assignee of the bill of lading who receives the goods becomes liable to this charge of demurrage in the same way as he becomes liable to pay the freight of the goods, demurrage being in the nature of extended freight.[475] But if there be no stipulation in the bill as to demurrage, although the consignee becomes liable to pay the freight of the goods by accepting them, there is no implied contract with the captain to pay him demurrage so as to enable the latter to sue for the same in his own name; and consignees who receive goods which by bill of lading are to be delivered to them, 'they paying for the said goods as per charter-party,' are not liable for demurrage arising at the port of shipment before the bill of lading was signed according to the terms of the charter, although it is thereby provided that the master shall have an absolute lien for such demurrage, and although before the delivery a claim be made for demurrage with notice of the terms of the charter-party.[476]

If there be no usage to the contrary, and no express exclusion of them, Sundays will be included in the calculation of 'running days' mentioned in a memorandum stipulating for demurrage. By the custom amongst merchants of London, where a vessel is to be unloaded

in the river Thames, Sundays and holidays are excluded.[477]

Where there is no express agreement as to when the running days shall commence, they are to be reckoned from the time of the ship's arrival at the usual place of discharge in the port, according to the usage of the port, and not *at* the port; and therefore, where a collier reached Gravesend on March 9 and was detained there by the harbour-master until the 20th, when she was ordered by him to proceed to the Pool, the ordinary place of discharge for colliers, it was held that the days were to be reckoned from the time of her arrival there; and this is so, although for the purposes of navigation some part of the cargo may necessarily be discharged from the vessel at the entrance to the port.[478]

If the place of discharge be a dock the days commence running from the period of the ship's arrival in the dock, and not of her coming to her berth or place of unloading in the dock; the delay in assigning the vessel a berth being the act of the dock officer, over whom the master could have no control.[479]

Where the shipper of goods has thus contracted by the bill of lading, or by charter-party, that the goods shall be unloaded by a specified time, he is bound by his contract, and answerable for all the various vicissitudes which may occasion the detention of the vessel beyond the time agreed upon, although he may have been willing to receive the goods within the time, and

been guilty of no omission or default; as if the delay be occasioned by frost or by custom-house regulations or restraints, or by seizure by custom-house officers.[480]

Nor is it any excuse to the consignee for not availing himself of the specified number of lay or running days, that he did not know of the ship's arrival, or that he did not receive the bill of lading in time. He might by his contract have guarded against such contingencies.[481]

In the case of a general ship, where there are goods on board belonging to different persons, shipped under separate bills of lading, stipulating for the payment of demurrage, the question has arisen whether a consignee, whose goods are at the bottom of the vessel, is liable to pay demurrage, although he may have been ready to receive and unload his goods, but has been unable to do so in consequence of the consignees, whose goods were on the top of his, having neglected to unload theirs, so that his could not be got at; and it has been decided that such consignee is liable for demurrage.

When a specified sum is to be paid for each day over and above the lay days, that sum is payable in respect of a fraction of a day during which the ship is detained.[482]

Lien for Freight.—The master of the ship has a lien on and is not bound to part with the possession of the goods until his freight and other charges have been paid.

This right appears to have been allowed to the master by most of the maritime codes of Europe; and he is entitled by the English common law to detain the cargo until payment is made. But the bill of lading as a rule expressly gives such lien, it being stipulated that delivery is to be made to the consignee or his assigns, upon he or they paying freight for the same, which is therefore a condition precedent to the delivery of the goods.

The master may detain any part of the merchandise for the freight of all that is conveyed for the same person under one consignment.[483] A delivery of part of several parcels of goods belonging to one owner, carried upon the same voyage, does not defeat the lien upon the remainder for the whole freight; but if there be two contracts to carry with different *termini* to the voyage in each contract, no lien attaches for freight under the one contract upon goods shipped under the other, and improperly detained on board by the carrier, for no lien can be acquired by a wrongful possession; and for this reason no lien attaches if goods directed to one place be improperly carried on to another beyond their destination; or if the master deals with the goods in such a way as to be guilty of a conversion of them.[484] So where part of the goods has been sold and delivered to different persons, as under an endorsement and transfer of a bill of lading, the carrier cannot retain the residue so as to make one consignee pay freight for

what was delivered to another, though the goods formed originally but one entire consignment.

The master, moreover, cannot detain the goods on board ship until these payments are made, as the merchant would then have no opportunity of examining their condition. In England the practice is to send such goods as are not required to be landed at any particular dock to a public wharf, and order the wharfinger not to part with them until the freight and other charges are paid, if the master is doubtful of the payment, and in such cases the lien of the master continues, the goods remaining in his constructive possession, and the wharfinger being his agent. And in cases where it is necessary under the customs regulations that the goods should be landed and put in the Queen's warehouses, if the duties are not paid the master may enter them in his own name, and thus preserve his lien.[485]

The master may waive his lien, and deliver the goods without insisting upon payment of the freight, in which case he may sue the consignor for the same. It is not compulsory upon the master to withhold the delivery of the goods until payment is made by the consignee. But if in such a case the master, having the offer of cash for freight, for his own accommodation and convenience take a bill of exchange in payment, which is subsequently dishonoured, he cannot afterwards sue the consignor; but if he takes the bill simply

because he cannot obtain payment in cash, the consignor continues liable.[486]

If the master voluntarily part with the possession of the goods out of his own or his agent's hands, he loses his lien upon them, and cannot afterwards reclaim them; but if the possession be put an end to by fraud, the lien revives if possession be recovered.

CHAPTER XIV.

LIABILITIES OF CARRIERS IN SHIPS.

Extent of Liability of Carriers in Ships.—Shipowners, like other common carriers, were formerly insurers, and were liable as such for any loss or damage to goods entrusted to them, unless it was occasioned by the acts of God or the Queen's enemies. They were also liable for damage done by their servants acting within the scope of their employment, upon the principle that persons undertaking the conveyance of goods are answerable for the conduct of the persons whom they employ, since the parties suffering damage know nothing of these persons and have no control over them. Even the exception of cases of *vis major* allowed by the civil law was not recognised by the common law. This general liability however no longer exists, it is not only usually narrowed by the express terms of the contract for carriage contained in the bill of lading, but has been materially qualified by successive Acts of Parliament.

The statutes which now regulate the liability of shipowners, in the cases to which the earlier Acts re-

ferred, are the Merchant Shipping Act of 1854 (17 and 18 Vict. c. 104) and its amendment Acts, in all twelve in number, which have been passed since.

By Section 503 of the Merchant Shipping Act of 1854 the owners of sea-going ships are not liable to any extent whatever for loss or damage happening without their actual fault or privity, to (1) any goods, merchandise, or other things taken or put on board, by reason of any fire happening on board; or (2) any gold, silver, diamonds, watches, jewels, or precious stones taken or put on board, by reason of any robbery, embezzlement, making away with or secreting thereof; unless the owner or shipper has at the time of shipping the same inserted in his bills of lading, or otherwise declared in writing to the master or owner of the ship, the true nature and value of such articles.

By Section 54 of the Merchant Shipping Amendment Act of 1862 the owners of any ship whatever, British or foreign, are not answerable in damages where all or any of the following events happen *without their fault or privity*, (1) where any loss of life or personal injury is caused to any person being carried in the ship; or (2) where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship; or (3) where any loss of life or personal injury is by reason of the improper navigation of the ship, caused to any person carried in any other ship or boat; or (4) where any loss or damage is, by reason of any such im-

proper navigation, caused to any ship, or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat, beyond the following amounts:—

Where loss of life or personal injury has occurred either alone or together with loss of or damage to ships, boats, goods, merchandise, or other things the limit of the owner's liability is 15*l.* for each ton of the ship's tonnage; and where the injury complained of is with respect to loss of or damage to ships, goods, merchandise, or other things the limit is 8*l.* for each ton.

The limitations of the shipowner's responsibility rest in England upon the authority of the statute law only. By the general law, however, of the maritime nations of continental Europe, the liability of the owner for the wrongful acts of the master is limited to the value of the ship and freight, and they may discharge themselves by abandoning them to the creditors.[187]

Carriers of goods in ships may limit their liability by special contract in the same way as carriers of goods by land; and when this is not done, their liability is determined by the Merchant Shipping Act or the usage of trade; and when these do not apply, their responsibility must be decided by the *lex loci contractûs.*

When once the liability is established, each owner is by the law of England, which differs in this respect from the civil law, liable *in solido* for the whole amount of the debt without reference to the proportion

of his interest, or to any stipulations between himself and other owners. A Court of Equity would distribute the liability rateably.[488]

Delivery of Goods by Carrier.—The mode of delivering goods and the termination of the carrier's liability depend upon the custom of the port of delivery, and the usage of particular trades. For instance, it has been decided that a hoyman, who brings goods from an out-port to the port of London, is not discharged by a delivery at the usual wharf but is bound to take care of the goods, and send them out by land carriage for delivery to the consignee.[489]

Where there is a bill of lading, the place at which and the person to whom delivery of the goods is to be made, will in general be regulated by the terms thereof.[490]

Notice of Arrival.—It does not appear to be necessary for the master to give notice to the consignee of the arrival of the ship. Indeed, in practice this would in many cases be impossible, because the goods are frequently consigned to order, and the master does not know to whom the goods belong, or to whom they are to be delivered, until the bill of lading, bearing the consignor's endorsement, is produced to him. It is the duty of the consignee to inquire for and watch the ship's arrival; but it frequently happens that the ship arrives before the consignee has received the bill of lading or advice of the shipment of the goods.[491]

The master is not bound to keep the goods on board of his ship for an indefinite period, but, after waiting a reasonable time without any person having produced a bill of lading, may deliver the goods to some person to keep until the bill of lading is produced.[492]

Nor is he bound to part with the possession of the goods until his freight is tendered to him; and if no one comes forward and claims them he may have them warehoused, and give directions to the wharfinger not to part with them until his freight and other charges have been paid. But if the consignee of goods be ready to receive them from alongside the ship, and tender the freight due, the master cannot insist upon landing them at a wharf, or subject him to any charges for wharfage or warehousing the goods.[493]

In the absence of any express contract, the law implies that the goods shall be delivered within a reasonable time; if there be any express stipulation in the bill of lading as to the time within which the goods are to be delivered, this must be complied with; in either case, if there be a delay in delivering the goods, the master and owners will be answerable in damages to the owner of the goods. A delay in delivering the goods will not be excused by the master's neglect, or his inability, even from unavoidable accident, to obtain the necessary clearances for sailing, unless he omitted to apply for them at the request of the shipper or consignee.[494]

Where goods are shipped for and on account of the consignee, but the bill of lading makes the goods deliverable to the order of the consignor, the master would be wrong in delivering the goods to the consignee, except upon production of a bill of lading endorsed by the consignor; for such a bill of lading conveys notice to the master, that although the goods be shipped on account and at the risk of the consignee, there may yet be some condition unperformed on which his right to possession depends, or some circumstances which must have induced the shipper to retain in his own hands the ultimate disposition of the goods, but upon such a bill of lading being produced to the captain endorsed, he is bound to deliver up the goods.[495]

Where a consignor has endorsed bills of lading to two different persons, the master will discharge his duty by delivering the goods to the holder of the bill of lading first endorsed by the consignor, if the master know the priority of endorsement.[496]

When there are adverse claimants, the master's proper course would be, if possible, to obtain an indemnity before making a delivery of the goods; if this cannot be obtained he will act at his own risk in making the delivery, and may become liable if he makes a delivery to the wrong person.

Countermand of the Shipment, Re-delivery of the Goods to the Consignor.—When goods have been shipped by a charterer or consignor on board a vessel to be

carried and delivered to the consignee, pursuant to a contract of sale, or under bills of lading, or under any contract by which the ownership and right of property in goods have been transferred to the consignee or some third party, the consignor's power over the goods is gone and he cannot lawfully countermand the consignment and require the goods to be delivered back to him. But if the goods are merely addressed to the consignor's agent for sale, or under circumstances which do not divest the consignor of his ownership and right of property in the goods, he may countermand the consignment and require the goods to be returned to him, subject to the following qualifications and restrictions. If the ship is a general ship, carrying other goods besides those of the consignor, the goods must be demanded back a convenient time before the period appointed for the ship's sailing, and the demand must be accompanied by a tender of the freight, and of the reasonable costs and charges of the re-shipment and re-delivery of the goods, and the demand must appear to have been made at a time when it was reasonably in the power of the master to comply with it, without injury to the cargo or the property of other persons on board, and without creating delay in sailing. If the entire vessel has been chartered, the charterer may demand back the goods on tendering all the reasonable charges and lawful claims of the shipowner and master upon them, together with the expenses of re-shipment. An

owner of goods shipped to proceed to a foreign port has a right to have them re-delivered to him when the vessel, having commenced her voyage, meets with a disaster, whereby the goods are damaged so much that they cannot be profitably carried to their destination.[497]

PART V.

CARRIAGE OF ANIMALS.

CHAPTER XV.

OF THE DUTIES AND RESPONSIBILITIES OF CARRIERS OF ANIMALS.

Duty to receive and carry.—It is not obligatory upon carriers to receive and carry live animals unless they publicly profess to do so, and have sufficient and convenient means for their transportation.

By Section 8 of the Railway Act all railway administrations are empowered to make general rules for regulating the traffic on the railways under their control, and under this provision they may, with the sanction of the Governor-General in Council, make such regulations as they may deem advisable for the carriage of live-stock.

The conveyance of horses, cattle, sheep, and other animals on a railway is attended with much risk and

danger. The rapid motion of the train, the noise of the engine, the shocks attendant upon shunting, &c., being apt to alarm them, and cause them to do injuries to themselves which no prudence or care on the part of the carrier can guard against. It is also necessary that they should be fed and watered during a long journey, or that some person should accompany and take charge of them during their transit; and it would be unreasonable to expect that railway administrations, who receive comparatively a small remuneration for the carriage of cattle, should be bound to bestow all this attention upon them; and they may therefore make such conditions as will excuse them from these duties.[498]

A carrier is equally at liberty to make a special contract for the carriage of animals as of any other species of property, and it is customary for carriers by railway in India to carry horses, cattle, and other live-stock only under such special contracts, in which they exempt themselves from or limit their liability for any injury which the animals may sustain whilst in transit.

In England, the Railway and Canal Traffic Act of 1854 provides that no greater damages shall be recovered for the loss of, or for any injury done to, any animals beyond the sum of *50l.* for any horse; *15l.* per head for any neat cattle; and *2l.* per head for any sheep or pigs, unless the person delivering the same to the railway company shall at the time of such delivery have declared them to be respectively of higher value; in

which case the railway company are authorised by the Act to demand and receive by way of compensation for the increased risk and care thereby occasioned a reasonable percentage upon the excess of value so declared above the respective sums so limited as aforesaid in addition to the ordinary charge. And in India rules sanctioned by Government, and therefore having the force of law to the same effect as the English statute, have been adopted by most of the railway administrations, with some variation in the standard of value at which the increased charge is levied.

It has been ruled by the English courts that the above-quoted section of the Railway and Canal Traffic Act applies not only to cases where the loss or injury has happened during the conveyance of the animal, but also to cases where the loss or injury has occurred while such animal was being received by the carrier, or being delivered by him at its destination.[499]

Where the value of the animals has not been declared and the increased charge paid, the sender cannot, in the absence of a special contract to the contrary, recover more than the amount for which the carrier by his rules limits his liability.

The plaintiff delivered a ram to the defendants to be carried on their railway. At the time the ram was delivered to the defendants no contract in writing was signed by the plaintiff, nor was any declaration of its value made by him. On the back of the forwarding

note were certain special conditions which limited the liability of the defendants for the injury or loss of sheep occasioned by the negligence of their servants to 2*l.* This note was not signed by the plaintiff. During the course of the journey the ram was injured by the negligence of the defendants' servants. The plaintiff having claimed 10*l.* for the injury to the ram, the defendants paid 2*l.* into court and contended that they were not liable for more :—*Held,* that, although no written contract had been made, the liability of the defendants was limited to the amount specified in the notice, it being in accordance with the terms of the Act.[500]

A carrier by railway in India being a bailee for hire cannot be held responsible for the loss of or injury to any animal carried by him, unless such loss or injury has resulted from neglect or other default on his part.

R. delivered a dog to a railway company for carriage on their railway. The company received it, not as common carriers, but as bailees for hire. The dog was delivered with a collar on it and a strap attached thereto. During the journey there was a change of trains; for security during the interval of change a servant of the company fastened the dog up by means of the strap, and the dog slipped through the collar, got on to the railway, and was killed :—*Held,* that the company were not liable, as no neglect on their part had been proved.[501]

A saddled horse delivered to a railway company to

be carried on a journey, was placed by their servants in a proper horse-box in the usual manner. The saddle was left on the horse according to the general custom in such cases, with the stirrups hanging down. At the end of the journey the horse was found to be injured in the forearm and fetlock. The horse was proved to be free from vice, and it was shown by the defendants that nothing unusual occurred to the train during the journey:—*Held* by *Martin*, B., and *Bramwell*, B., that in the absence of further proof of the cause of the mischief, the company were not liable. *Contra*, by *Pigott*, B., on the ground that, in order to relieve themselves from liability, the company must show affirmatively the mischief arose from the act of the animal itself and not from their neglect or default.[502]

The liability of carriers in respect to live-stock, even in the case of a special contract, is subject to the exemption of any act wholly attributable to the development of a latent inherent vice in the animal itself.

A bullock, one of a number of cattle delivered to a railway company, was properly loaded into a cattle-truck by the railway servants. The truck was carefully fastened and secured, but in the course of its journey the bullock escaped from the truck and was found lying dead on the railway. There was no negligence on the part of the railway company, and the fact was that the escape of the bullock was wholly attributable to the

efforts and exertions of the animal itself:—*Held*, that the company were not liable for the loss.[503]

In a suit instituted against the Great Northern Railway Company, it appeared that the plaintiff booked a cow by the defendants' line, and at the time of doing so signed a contract by which it was agreed that the cow was to be conveyed upon certain conditions, one of which was as follows: 'The G. N. R. Co. give notice that they convey horses, cattle, sheep, pigs, and other live-stock in waggons, subject to the following condition: That they will not be responsible for any loss or injury to any horse, cattle, sheep, or other animal, in the receiving, providing, or delivering, if such damage be occasioned by the *kicking, plunging, or restiveness* of the animal.' The cow was put into a truck and conveyed to S., where a servant of the defendants, who was in charge of the yard or loading place, let her out of the truck, although he was cautioned by the plaintiff not to do so at that time. The cow rushed out of the truck, and after running about the yard got upon the line and was killed:—*Held*, that the accident to the cow was attributable to the fact that the defendants' porter let her out of the truck without waiting a reasonable time, as he might have done, and not to any inherent vice in her, and that the defendants were therefore liable to the plaintiff for the value of the cow.[504]

A carrier is not excused when an animal escapes

from control and so lost owing to its being improperly secured, and this was apparent at the time of receipt.

Where a dog was delivered to a carrier with only a rope round its neck to secure it, and in that state was received by him, the carrier was not allowed to show, in an action for the loss of the dog, that there should have been a collar about the dog's neck, or some other mode adopted by the plaintiff to have insured the proper security of the animal. Lord *Ellenborough* held that the defendant had the means of seeing that the dog was insufficiently secured, and, having accepted it in that condition for conveyance, was liable for its loss.[505]

It is incumbent upon a carrier to provide suitable and properly ventilated vehicles for the conveyance of animals, if he professes to carry them, and a special contract will not protect him from liability for injury to them when such injury has arisen from the vehicles supplied by him being defective, or unfit for the purpose.

In an action for injuries to a horse occasioned, it was alleged, by the faulty condition of a shutter of the horse-box in which the horse was being conveyed from London to Wellingborough, the plaintiff proved that he dispatched by the defendants' railway six driving horses from St. Pancras station in charge of grooms.[506] The horse-box in which three of them were placed was of the usual pattern, and fitted with a coupé at the horses' heads for the use of the grooms. It appeared

that no groom travelled in this coupé until the train arrived at Luton. At that station one of the grooms entered the coupé, and shortly after the train began to move he discovered that the upper shutter on one side of the box was loose and flapping about, causing the horse on that side to 'hang back' and to strain with apparent fright. He endeavoured to quiet the animal, and for some time held the shutter down so as to prevent the noise. At Bedford station he called for help, both from his fellow grooms and from the company's servants. No practical repair was effected, the grooms merely tying the shutter down with string. For the rest of the journey the horse seemed quieter, but on arrival at Wellingborough was found to be dead lame. The brother of the plaintiff met the train, and at once ordered the horse to be returned to London, and it was for this purpose put into another box. The horse was then examined by a veterinary surgeon, who pronounced it to be suffering from a dislocation of the hip joint and a fracture of one of the lumbar vertebræ. The plaintiff was communicated with by telegraph, and, by his direction, the horse was shot. The plaintiff, in evidence, stated that he had had the horse for six months before the journey in question; that it had on more than one occasion travelled by train while in his possession, and had been always quiet and steady.

The defendants' case, as stated by their counsel,

supported by the evidence of the guard of the train, the station-master at Wellingborough, and other minor officials, was to the following effect: That the horse was properly and securely loaded at St. Pancras; that the horse-box was in all respects a good and proper one; that the horse had forced the shutter out of the groove by its shoulder or mouth; and that the injuries, part of which they admitted had occurred on the journey, had been done before the train reached Luton, while no groom was in attendance. The plaintiff's counsel met this plea of contributory negligence by evidence that no rule or notice of the company required the groom to travel in the horse-box. The defendants further endeavoured to prove that the horse was only slightly injured before reaching Wellingborough, and that it had further injured itself by restive behaviour in the horse-box into which it had been put, for return to London, by the orders and at the risk of plaintiff's brother.

His Lordship, in summing up the case to the jury, pointed out that it was almost impossible that any force exercised by the horse could have resulted in the shutter being displaced in the manner described by the witnesses; and the jury returned a verdict for the plaintiffs.

Where a railway company accepted horses for conveyance and loaded them in rotten and insecure horse-boxes so that holes were made by the horses' feet in the

bottom of the vehicles and the animals were injured, it was held that the railway company were liable although the horses were carried at 'owner's risk' under a special contract exempting the company from all responsibility for any injury, *however caused*; the damage not having arisen from any of the risks naturally incidental to railway travelling.[507]

Carriers are also responsible for the consequences of delay in transit where such delay is unreasonable or wilful, unless the consequences are due to some inherent defect in the animals.[508]

It is the duty of the carrier to afford reasonable facilities for the feeding and watering of all animals whilst in transit, and in the event of delay or sickness during their journey to have them fed and properly treated so far as it is in his power to do so. The same obligation is imposed upon a carrier in respect to animals as with regard to other property, viz. that of taking the same care of them as a prudent man would of his own animals of the same kind under similar circumstances.

Carriers are exempted from all liability for loss of or injury to animals arising from the acts of God or the enemies of the Queen, or inevitable accident under the same rules as apply to the carriage of passengers and goods.

Freight on Animals.—Where living animals as cattle are the subjects of carriage, and there is no express agreement whether the freight is to be paid for

the loading or for the transporting of them, freight is payable as well for those which may die during the voyage as for the living. If the agreement be that freight shall be paid for so many animals as shall be put on board a ship, and any of them die before the ship reaches her destined port, freight is due for the whole, because the contract is fulfilled. If the agreement be to pay freight for conveying and delivering them at a certain place, then no freight is due for those that die on the passage, because as to them the contract is not complete by actual conveyance.[509]

It is the custom of the port of London for the master to undertake the delivery of cattle before he receives his freight, and therefore if they die on the voyage he loses his freight.

PART VI.

STOPPAGE IN TRANSITU.

CHAPTER XVI.

OF THE VENDOR'S RIGHT OF STOPPAGE IN TRANSIT.

The Indian Contract Act of 1872 provides that:—

'A seller who has parted with the possession of the goods and has not received the whole price may, if the buyer becomes insolvent, stop the goods while they are in transit to the buyer.

'Goods are deemed in transit while they are in the possession of the carrier, or lodged at any place in the course of transmission to the buyer, and are not yet come into the possession of the buyer or any person on his behalf, otherwise than as being in possession of the carrier, or as being so lodged.

'The seller's right of stoppage does not, except in the cases hereinafter mentioned, cease on the buyer's resell-

ing the goods while in transit and receiving the price, but continues until the goods have been delivered to the second buyer or to some person on his behalf.

'The right of stoppage ceases if the buyer, having obtained a bill of lading or other document showing title to the goods, assigns it while the goods are in transit to a second buyer, who is acting in good faith and who gives valuable consideration for them.

'Where a bill of lading or other instrument of title to any goods is assigned by the buyer of such goods by way of pledge, to secure an advance made specifically upon it, in good faith, the seller cannot, except on payment or tender to the pledgee of the advance so made, stop the goods in transit.

'The seller may effect stoppage in transit, either by taking actual possession of the goods or by giving notice of his claim to the carrier or other depository in whose possession they are.

'Such notice may be given either to the person who has the immediate possession of the goods or to the principal whose servant has possession. In the latter case the notice must be given at such a time and under such circumstances that the principal, by exercise of reasonable diligence, may communicate it to his servant in time to prevent a delivery to the buyer.

'Stoppage in transit entitles the seller to hold the goods stopped until the price of the whole of the goods is paid.'[510]

Who has the Right to stop Goods.—The party exercising the right of stopping *in transitu* must stand in the relation of vendor *quoad* the bankrupt or insolvent; a mere surety for the price of the goods is not entitled to stop them in transit.

A stoppage to be valid must be made by the vendor or his agent duly authorised, hence a claim to stop, made by a stranger on behalf of the vendor, cannot after the goods have been demanded by the vendee at their destination be ratified by the vendor so as to divest the property in the goods.

Where the right of stopping the goods exists it vests in the seller, and cannot be divested by any claim made upon the goods in their transit by a creditor of the consignee, as, *e.g.*, by process of foreign attachment at the suit of such creditor, or by a carrier claiming to retain the goods as a lien for a general balance of account due from the consignee, for the vendor's right of stopping in transit is the elder and preferable lien.

When Goods are in transitu.—The consignor can only exercise his right of stoppage so long as the goods remain in the possession of the carrier under the original contract for their carriage. Thus, where goods are tendered to and refused by the consignee and afterwards warehoused by the carrier they are still considered as in transit and the consignor has the right to countermand their delivery, but if the delivery of the goods has been accepted by the consignee and they are warehoused by

the carrier at the request of, and for the consignee, the consignor's power over them ceases.

But goods are not *in transitu* when they are being conveyed in the purchaser's own ship, cart, or carriage, under the custody and care of his own servant or agent. If a purchaser charters and despatches a vessel to a distant port to receive the goods, and they are put on board, the fact of their being *in transitu* will depend upon the character in which the master or commander receives them.

If the charter-party amounts to a demise or bailment of the ship, the charterer becoming the temporary owner, and the master his servant, the delivery of the goods on board will be a delivery to the charterer or purchaser, and the possession of the master his possession, and the vendor will have no right to retake them unless the goods are shipped under a bill of lading reserving to the vendor control over them.[511]

A delivery on board the purchaser's own ship and to his own master is not inconsistent with the vendor's entering conditions in the bill of lading which may enable him to retain a right to stop the goods, and prevent delivery if the terms are not complied with. As an illustration, where B., a merchant of London, orders 100 bales of cotton off A., a merchant of Bombay, and sends his own ship to Bombay for the cotton, the transit is at an end when the cotton is delivered on board the ship; but if A., when delivering the cotton

on board the ship, takes bills of lading from the master making the cotton deliverable to B.'s order or assigns, the transit continues until the cotton arrives at London and is actually delivered to B.[512]

Goods delivered to a carrier to be conveyed from a vendor to a purchaser are held to be in transit although they may have been consigned to a carrier specially appointed by the purchaser.[513]

The transit is not determined although the goods may be under the charge of a general forwarding agent of the purchaser or in the hands of a packer or wharfinger, or innkeeper, or any other middleman forming a mere link in the chain of communication or transmission from the buyer to the seller.

In *Hunter* v. *Beal* an action was brought for a bale of cloth which was sent by A. to the defendant B., who was an innkeeper, directed for the bankrupts, to whom the defendant's book-keeper gave notice that a bale had arrived for them; and A. at the same time sent them a bill of parcels, the receipt of which they acknowledged, and wrote word that they had placed the amount to the credit of A. The bankrupts gave orders to the defendant's book-keeper to send the bale down to the quay, in order to ship it on board the *Union*, to be carried to Boston. The defendant accordingly sent the bale to the quay, but arriving too late to be shipped it was sent back to him. Within ten days afterwards a clerk of the bankrupts went to the

defendant's warehouse, when the defendant asked him what was to be done with the bale in question, and was ordered to keep it in his custody until another ship sailed, which would happen in a few days. The bankruptcy happened soon afterwards; and A. sent word to the defendant not to let the bale out of his hands: accordingly when the bankrupts applied for it he refused to give it up. *Lord Mansfield* was clearly of opinion that though the goods might be legally delivered to the vendees for many purposes, yet as for this purpose there must be an actual and absolute possession by the bankrupts, or (as his lordship expressed it) the goods must have come to the *corporal touch* of the vendees; otherwise they may be stopped *in transitu*, a delivery to the third person to convey them is not sufficient.[514]

The preceding case of *Hunter* v. *Beal* was much commented upon by *Lord Ellenborough*, who remarked, in giving judgment in a similar case: 'As to *Hunter* v. *Beal*, in which it is said that goods must come to the corporal touch of the vendees, in order to oust the right of stopping in transit, it is a figurative expression rarely, if ever, strictly true. If it be predicated of the vendee's own actual touch, or of the touch of any other person, it comes in each instance to a question, whether the party to whose touch it actually comes be an agent so far representing the principal as to make the delivery to him a full, effectual, and final delivery to the principal

as contra-distinguished from a delivery to a person virtually acting as a carrier, or mean of conveyance to or on account of the principal, in a mere course of transit toward him. I cannot but consider the transit as having been once completely at an end in the direct course of the goods to the vendee; *i.e.* when they had arrived at the innkeeper's, and were afterwards under the immediate orders of the vendee, thence actually launched again in a course of conveyance from him in their way to Boston, being in a new direction prescribed and communicated by him. And if the transit be once at an end, the delivery is complete and the *transitus* for this purpose cannot commence *de novo*, merely because the goods are again sent upon their travels towards a new and ulterior destination.

In *Hunt* v. *Ward*, where goods had been sent by orders from the vendee to a packer, the packer was considered as a middleman between the vendor and vendee; and therefore the court held that they might be stopped in transit on the bankruptcy of the vendee. So where A. sold goods to B., and according to B.'s direction sent them to C., a wharfinger, to be by him forwarded to B., it was held that while they were in C.'s hands they might be stopped by A., because they were merely at a stage upon their transit, and could not be considered as having arrived at their final destination.[515]

When goods have reached their destination they

may still be in certain cases considered as being in transit, although they have passed out of the carrier's possession, as when they are landed at the Custom house.[516]

When a ship is put in quarantine on arrival at destination, the voyage is not completed until the term of quarantine has expired, and all goods on board are considered as *in transitu* during that period.[517]

When the Transitus may be considered as Determined.—So long as the carrier holds the goods as a mere instrument of conveyance, or in the character of a forwarding agent, the transit continues, and the unpaid seller has a right to stop them; but if the carrier enters expressly, or by implication, into a new agreement with the purchaser distinct from the original contract for carriage, to hold the goods for the purchaser as his agent, the transit is at an end, and the goods are constructively in the possession of the purchaser, and cannot be retaken by the vendor. But the assent of the carrier to hold the goods as an agent for custody on behalf of the purchaser must be clearly established.[518]

But although the goods may have been landed and warehoused at a place commonly used by the purchaser as a place of deposit, yet, if the latter, finding himself to be in failing circumstances, has previously declared it his intention not to accept the goods, and not to take possession of them as owner, there has been no actual

delivery, and the unpaid vendor's right of recovering possession has not been destroyed.

When the purchaser has no warehouse, or no other place of delivery, than the warehouse of the carrier, wharfinger, or packer, and there is no place of ulterior delivery in view, the transitus will be considered at an end when the goods have arrived at such warehouse, that being their last place of delivery.[519]

So where goods are to be delivered to the vendee at a particular place, the transitus continues until they are delivered to him at that place; but if he by his own act prevent the delivery, which otherwise in the ordinary course would take place, and does any act equivalent to taking possession, the *transitus* is thereby determined, and therefore where the vendee of several hogsheads of sugar, upon receiving from the carrier notice of their arrival, took samples from them, and for his own convenience desired the carrier to let them remain in his warehouse until he should receive further directions, and before they were removed became bankrupt, it was held that the transitus was at an end and that the vendor was not entitled to stop them.[520]

On a contract for the sale of goods lying in a warehouse, the handing of a delivery order to the vendee, and transfer of the goods to him in the warehouseman's book, will not vest the property in him if something remains to be done for the purpose of ascertaining the

identity or quantity of the goods, as the weighing of an article forming part of a bulk and sold by weight.

It has been held that delivery to the vendee was not complete, so as to prevent the vendor from countermanding his delivery order, in the following cases:—

Ten tons of Riga flax were sold at 118*l.* per ton, to be paid for by the purchaser's acceptance at three months, and the ten tons were to be separated from a larger quantity lying in bulk upon a wharf, and the vendor gave to the purchaser a delivery order on the wharfinger for the ten tons, which order was accepted by him and entered in his books, but, before the weighing and separation of the ten tons from the bulk, the purchaser became insolvent.[521]

Where fifty tons of oil were sold at a fixed price, and an order for the delivery thereof was given to the purchaser, and forwarded to the wharfinger who had the custody of the oil, but it was the custom of the trade for the casks to be searched by the cooper of the vendor, and for the broker of both parties to examine them to ascertain the dirt and water in each, with a view to certain allowances in respect thereof, and then the casks were to be filled up by the cooper at the expense of the vendor, and the purchaser became insolvent before these preliminary acts had been performed.[522]

Where a purchaser agreed to purchase the 'small parcel of starch' belonging to the vendor which he had seen lying at the house of a third party, at 6*l.* per cwt.,

to be paid for by bills at two months, fourteen days to be allowed for delivery, and the vendor gave a note to the purchaser addressed to the warehouse keeper, directing him to 'weigh and deliver' to the purchaser 'all his starch,' which order was forthwith lodged at the warehouse, and a large portion of the starch, on that and two subsequent days, was weighed and delivered to the purchaser, and removed pursuant to the order, but the purchaser became bankrupt whilst the residue remained unweighed in the warehouse, and the vendor countermanded the delivery of the unweighed residue.[523]

Cessation of Right on Assignment of Document showing Title.—Where the property in goods has passed to a vendee, subject only to be divested by the vendor's right to stop them while in transit, such right must be exercised, if at all, before the vendee has parted with the property to another for a valuable consideration, *bonâ fide*, and by endorsement of the bill of lading or other document evidencing title to the goods (without notice of such circumstances as render the bill of lading not fairly and honestly assignable) has given him a right to them, for the endorsement of a bill of lading for a valuable consideration, and without notice to the endorsee of a better title, passes the property.

But the legal title of the endorsee of a bill of lading may be impeached on the ground of *mala fides*, and where there has been a want of good faith in the assignment

of the bill of lading, the vendor's right is not affected thereby. As an illustration :—

A. sells and consigns certain goods to B., and sends him the bill of lading. A. being still unpaid, B. becomes insolvent, and while the goods are in transit assigns the bill of lading for cash to C. Here, if C. was not aware of B.'s insolvency, A. cannot stop the goods in transit, but if C. knew that B. was insolvent at the time, A.'s right to stop the goods is not affected by the assignment, it not having been made in good faith.[524]

Thus, if the intended vendee of goods, in fraud of the vendor, procures the master improperly to sign bills of lading without delivery of the mate's receipt, such bills of lading will convey no title to an innocent endorsee as against the vendor, though they may subject the master or his owners to an action.[525]

Where the vendor's legal right of stopping in transit has been determined by the endorsement of the bill of lading, but such transfer has been made only as a security for advances specifically made on the bill by the endorsee, the transfer is treated as a pledge or mortgage only, and the vendor has an equitable *quasi* right of stoppage, subject to the previous right of the endorsee to be repaid his advances; for although the legal right to the goods is transferred with the bill of lading, yet the transfer takes effect only to the extent of the consideration paid by the transferee, leaving in the vendor an equitable interest in the surplus value.[526]

The assignment of a bill of lading or other document of title does not bar the right of the vendor to stop the goods when the bill is assigned as security for a general balance of account, or a debt contracted before its endorsement. The vendor is only liable to the endorsee for the amount of any advance *specifically* made in good faith upon the document.[527]

A bill of lading remains in full force until there has been a complete delivery of the goods thereunder to a person having a right to receive them, and is not exhausted by the landing and warehousing them at a sufferance wharf.[528]

PART VII.

MEASURE OF DAMAGES.

CHAPTER XVII.

OF THE CONSEQUENCES OF BREACH OF CONTRACT.

Damages, Measure of.—The term 'damages' signifies a pecuniary compensation recoverable for an actionable wrong, breach of contract, or other injury. The term *Measure of Damages* is synonymous with the 'scale' or 'rule' by reference to which damages are in any given case to be assessed.[529]

In the first place it holds generally true that in an action for breach of contract, the intention or motive of the party charged cannot be inquired into, and, indeed, will be irrelevant to the issue. In such an action the main questions for determination will be, What was the contract? Was it broken by the defendant? If the terms of the contract be ascertained, and its breach be proved, the only other inquiry will be as to the *amount of damages to be awarded*; and, in estimating these

damages, the motive or intention of the defendant will be immaterial. The good of society requires that contracts mutually assented to should be inviolably observed and strictly executed. If a man expressly covenants or, on a proper consideration, promises to do an act which he would not be otherwise bound by law to perform, he, by his own deliberate act, imposes on himself a responsibility from which he cannot be relieved unless by consent of the contractee; and, if guilty of a breach of his covenant or promise, is at law compellable to make compensation to the party injured.[530]

Under the Indian Contract Act, 'when a contract has been broken, the party who suffers from such breach is entitled to receive from the party who has broken the contract compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

'When an obligation, resembling those created by contract, has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default as if such person had contracted to discharge it and had broken his contract.'

The explanation given to the foregoing section in

the Act declares that 'in estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.'[531]

Where the contracting parties have not by mutual stipulations precisely indicated the amount of damages to be recoverable by either in the event of a breach of contract, such damages will have to be assessed according to the general rules of law: (1) 'That, where a person makes a contract and breaks it, he must pay the whole damage sustained;' (2) 'That, where a party sustains a loss by reason of a breach of contract, he is, as far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed;' and (3) 'That, where one party does not perform his part of the contract, the other party may do so as reasonably near as may be, and charge him for the *reasonable* expense incurred in so doing.'[532]

The principles laid down in the leading case of *Hadley* v. *Baxendale* have been adopted generally by the Courts of England and India as the basis upon which damages for breach of contract may be assessed, and these principles have been embodied in the above-quoted section of the Indian Contract Act. This action was brought by the owner of a steam grist mill against a carrier for delay in delivering the broken shaft of the mill to the plaintiff's engineer, who was thereby pre-

vented from supplying a new shaft. It appeared at the trial that the broken shaft was to be sent to the engineer as a model for a new one, and at the time of the contract for the carriage being made the carrier was informed that the mill was stopped, and that the shaft must be sent immediately. It further appeared that its delivery at its destination was delayed for several days, and that in consequence the plaintiff did not receive the new shaft back as he expected, and his mill was kept idle. It was held that the judge who presided at the trial in the lower court should have directed the jury that they ought not to take into consideration, in estimating the damages, the loss of profit from not working the mill.

Alderson, B., in delivering the judgment of the court, thus explained the principles upon which a jury ought to be guided in estimating the damage arising out of a breach of contract of this kind: 'Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may fairly and reasonably be considered arising naturally, *i.e.* according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the con-

tract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damage resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of the contract under these special circumstances so known and communicated. But, on the other hand, if those special circumstances were wholly unknown to the party making the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally, and, in the great multitude of cases, not affected by any special circumstances from such a breach of contract. For had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them. In the present case we find that the only circumstances communicated by the plaintiff to the defendant at the time the contract was made were, that the article to be carried was the broken shaft of a mill, and that the plaintiff was the miller of that mill. But how do these circumstances reasonably show that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person?'[533]

In actions of *tort* for a direct injury to the person or property, or for the wrongful taking or conversion of

goods, the right of action is founded (1) on the invasion of some legal right, or (2) on the violation of some public duty, or (3) on the infraction of some private duty or obligation productive of damage to the complainant. The damages recoverable in an action *ex delicto* are in general regarded as purely compensatory and in satisfaction for the injury sustained; and, in assessing them, the motive, intention, or conduct of the wrong-doer generally forms a material element.[534]

Every carrier of passengers has a public duty cast upon him by law, independently of any contract, to use proper and reasonable care in carrying the passengers who travel in his conveyances, and negligence on his part or that of his servants being a violation of that duty, is sufficient, when proved, to sustain an action for damages.[535]

CHAPTER XVIII.

MEASURE OF DAMAGES IN CASES OF PERSONAL INJURY.

In Case of Death of Person injured.—Act XIII. of 1855 (Lord Campbell's Act, 9 and 10 Vict. c. 93 in England) innovates the old-established rule of the common law that an action for bodily hurt cannot be maintained after the death of the injured person for the benefit of his estate, and provides that an action shall be maintainable by an executor or administrator for the benefit of certain of the surviving members of the family of a person whose death has been caused by an actionable wrong.

It may naturally be asked how, where an action is successfully brought under the Act referred to, the measure of damages ought to be determined? what considerations may influence the court in assessing them? To such queries these general answers must suffice, that where death is caused by negligence the court is to award *compensatory* damages only, not vindictive or exemplary damages; and further, that it should exclude from its consideration as well the loss or

suffering of the deceased himself as the mental anguish caused to his family by his death, and restrict its award to the actual pecuniary damage resulting to the family therefrom: by reason of expenses to which they may have been thus put; by reason of the loss of salary (if any) enjoyed by the deceased, and benefiting his family; by reason of the loss of business profits.[536]

Such are the ordinary elements and considerations available for an assessment of damages under the statute mentioned. In an action brought under its provisions the evidence of experts, such as accountants and actuaries, is admissible, and will sometimes remove difficulties which might be insurmountable by a court thus unaided. Doubtless extraordinary facts may be suggested or imported into almost any given case which would render a satisfactory decision touching the amount of damages to be awarded extremely difficult. It seems, however, that mere remote contingencies cannot be taken into account at all in the assessment of damages. To railway companies in England there can be no doubt that hardship has been caused through the readiness of juries to compensate individuals inordinately at their expense for damage sustained in consequence of the death of a relative through negligence.

In Case of Personal Injury not fatal.—The rule of law in assessing damages in cases of personal injuries not attended with a fatal result is to give the plaintiff compensation for his pain and suffering and for his

money loss. For instance, in the case of an unfortunate labourer who has suffered an injury which has kept him out of work for, say, six months. He was making 25*s.* a week at the time the injury was done, that is, twenty-six weeks at 25*s.* a week; then he says that for ten weeks more he has only been able to earn 10*s.* a week, that is, ten times 15*s.*; perhaps he also says that he will not be able to get into full work again for twenty weeks, that is, twenty times 15*s.* To these amounts something is added for doctor's expenses, and in that way one arrives at some kind of compensation for his necessary loss. In the case of a professional man, and where perhaps it may be impossible to get at any definite term during which the plaintiff will be unable to work, the question for the court to consider is how long he will be incapacitated from carrying on his profession, and compensation must be given in reference to that. Of course it is in all cases possible that the labourer might not have been able to get work, or possibly the professional man might have lost patients or clients. All these contingencies, where they properly arise, ought to be taken into account, but, after all, the fundamental rule is to 'give the man a fair and reasonable compensation for his pecuniary loss.'[537]

In the case of *Phillips* v. *The London and South-Western Railway Company*, just decided by the High Court of Appeal, the plaintiff was a physician in large practice in London, and independently of his pro-

fessional earnings he was in the enjoyment of a considerable private income. The action was brought to recover compensation for very severe injuries suffered by the plaintiff in a collision which took place on the defendants' railway between an engine and a train in which the plaintiff was a passenger. The case was first tried in the Common Pleas Division before *Field*, J., in April 1879, when the jury found for the plaintiff with 7,000*l.* damages, an amount with which he was so dissatisfied that he applied for a new trial and obtained it, and again won his case, with a verdict this time of 16,000*l.*

In summing up on the second trial, *Lord Coleridge* told the jury that there was no answer to the *primâ facie* case of negligence, and proceeded as follows: 'It is therefore really and truly in fact a mere question of assessment of damages, what, under the present circumstances, it is fair and reasonable the defendants should pay the plaintiff by way of compensation for the injuries he has sustained. It is to be such compensation as, under all the circumstances of the case, the jury who have to assess it think is fair and reasonable, and with every desire to assist you I am afraid that anything more definite or intelligible I am unable to lay down. It is a matter in which really the common sense of the country as represented by you twelve gentlemen in the jury-box must determine. An absolute compensation is not the true measure of damage in this case. It is not to be an absolute

compensation, but a fair and reasonable amount of damages under the circumstances of the case. Now what is really that fair and reasonable amount? It must be made up of several ingredients. I do not mean that if you give, I will take a round sum, say 100*l.*, you must go so far as to give 25*l.* for pain and suffering, 25*l.* for loss and damage, 25*l.* for future suffering, and 25*l.* for the chance of not doing work again. By saying the compensation consists of so many ingredients I do not mean to say you must put a fixed sum against each of these, but there are certain leading considerations to be taken into account by you in arriving at the lump sum which at last it will be your duty to assess in this case. Now, one of these is the pain and suffering; as to that there is no question . . . . . pain and suffering of a most acute kind Dr. Phillips has sustained, that has not been seriously disputed, and compensation for that pain and suffering he is undoubtedly entitled to. That is a serious, manifest, and undisputed fact. Then there is the loss, at any rate for two years, of his business. Now, what is that business?' The Chief Justice then directed the attention of the jury to the evidence as to the plaintiff's professional income, the effect of which was to show that during the three years before the accident his net earnings, after deducting all the expenses incurred in carrying on his profession, had been about 5,000*l.* a year. He then proceeded as follows: 'But then it is said that

is too much, because some of these are large payments which have come from nine clients, and in the nature of things it is not likely that these sums will recur. This 1,300*l.* from one person in three years, that 400*l.* from another in two years, 360*l.* from another in two years, and nearly 500*l.* from another in three, all these and other sums are not likely to recur. Now, I do not see at all why the confidence of the gentlemen who make these large payments should diminish, or their generosity either, and I do not quite see why, in the class of patients this gentleman had, people who send 1,000*l.* and 500*l.* and so on (5,000*l.* in one case) to their doctor, without inquiry, to pay for the number of visits that had been had, I do not see why the same gentleman should not pay 5,000*l.* over again . . . . it is a lucky thing, if Dr. Phillips should recover, that his practice is among patients who do not care about money . . . . I really do not see why these should be the only nine people in the world who do these things, and who will continue to do them, and why, if they cease to do so, they should not be succeeded by others equally generous; but you must give it such weight as you think fit. Subject to that observation it comes to this, that it is about 5,000*l.* a year, and it has been an increasing practice. . . . There is no doubt that from that time in 1877' (the time of the accident) 'to this he has not earned a shilling, and for that some very considerable compensation is to be awarded by

the company. Now then comes a far more important question, and that is, What is to be his future?'

The defendants were now dissatisfied with the verdict and moved for a new trial on the ground that the damages were excessive, and that the jury had been misdirected in being told to take into account the plaintiff's professional income in assessing the damages. *Sergeant Ballantine*, on behalf of the defendants, contended that when they entered into the contract of carriage with the plaintiff they had no knowledge and no means of knowing that he was earning a large income by the practice of his profession, that that head of damage was not in the contemplation of the parties when they entered into the contract, and was, according to the principles laid down in *Hadley* v. *Baxendale*, too remote. The High Court of Appeal, per *Bramwell*, *Brett*, and *Cotton*, Lords Justices, however, decided that the jury had been properly directed according to the existing law, and refused to grant a new trial. The case will probably be referred to the House of Lords.[538]

That the law on the subject of damages in cases of personal injury requires modification scarcely admits of question, and some limit should be fixed to the liability of railway companies in such cases. As the law now stands, the consequences of an accident to a train crowded with eminent professional men on their way, say, to the scene of an important trial as advocates or wit-

nesses, might be simply ruinous to even an influential company.

In actions for damages on account of personal injury the same rule applies regarding indirect and remote loss as in similar actions on account of non-delivery of goods. In the recent case of *Godfrey et Uxor* v. *The London and South-Western Railway Company*, the plaintiffs' case was, that the door of the carriage in which Mrs. Godfrey was travelling was not properly fastened; and when Mrs. Godfrey was in the act of changing her carriage at a junction, the train, which had apparently stopped, gave a violent jerk, which caused her to stagger against the door. She fell out, and, although caught by a porter, sustained serious injuries, she being *enceinte* at the time. The plaintiffs claimed compensation in respect of doctor's charges, of pain suffered, and the loss of an appointment by Lieutenant Godfrey, who wished to be near his wife during her illness. The defendants called no witnesses in support of their case, but contended that, inasmuch as almost six weeks had elapsed before any complaint was made to them, and as the story told by the plaintiffs was an improbable one, no compensation should be allowed. The court gave judgment for the plaintiffs, allowing 32*l.* for expenses, and 50*l.* compensation for pain and suffering, but nothing in respect of loss of appointment by Lieutenant Godfrey.[539]

In Case of Loss or Delay to Trains.—Where a passenger is delayed on his journey, or, owing to want

of punctuality in the arrival of one train at a junction station, misses another by which he intended to continue his journey, and the liability of the railway administration is established, he is entitled to receive from the administration making default compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach of contract.

When a passenger loses a train at a junction station through any such delay, he may perform the remainder of the journey by such means as may be available at the expense of the carrier with whom his contract was made. The principle is, that if one party does not perform his contract, the other may do so as reasonably near as may be, and charge him for the *reasonable* expense incurred in so doing; and a proper test of what is reasonable in such a case is to consider whether, according to the ordinary habits of society, a person delayed on his journey, under circumstances for which the railway administration was *not* responsible, would have incurred the expenditure on his own account.[510]

In another case, where the plaintiff, owing to the delay of a train belonging to the defendants, missed meeting several customers with whom he had business engagements, and incurred expense in waiting some days until they returned, it was ruled that the damages claimed were too remote, and that he was only entitled to nominal damages, and perhaps hotel expenses for one

night, as he could have returned by train to his home the next day and made other arrangements for a meeting with his customers.[541]

In Case of Delay in Sailing of Ship.—A., a shipowner, contracts with B. to convey him from Calcutta to Sydney in A.'s ship, sailing on January 1, and B. pays to A., by way of deposit, one-half of his passage-money. The ship does not sail on January 1, and B., after being, in consequence, detained in Calcutta for some time, and thereby put to some expense, proceeds to Sydney in another vessel, and, in consequence, by arriving too late in Sydney, loses a sum of money. A. is liable to repay B. his deposit with interest, and the expense to which he is put by his detention in Calcutta, and the excess, if any, of the passage-money paid for the second ship over that agreed upon for the first, but not the sum of money which B. lost by arriving at Sydney too late.[542] But if time in such a case was not essential to the contract, and the ship sailed within a reasonable period after January 1, B. would not be entitled to a return of his passage-money, nor to the expense attendant upon his stay in Calcutta.

In the Case of Loss or Non-delivery of Goods.—In an action against a carrier for the non-delivery of goods, the ordinary measure of damages is the value of the goods to the owner at the *place* and *time* at which they ought to have been delivered.

In the case of *Madai* v. *The East Indian Railway*

Company, the plaintiff claimed compensation for non-delivery of a consignment of grain despatched from Allahabad to Bellary at the rate at which grain was sold at the latter station, where famine prices obtained. Upon a reference by the Small Cause Court of Allahabad as to the measure of damages, the High Court N.W.P., per *Turner* and *Oldfield*, J.J., ruled that the plaintiff was entitled to recover damages for the loss of his market at Bellary. In other words, that the damages must be computed on the price of grain at Bellary on the date on which the grain should have arrived there, had it been despatched and carried in due course.[543]

A., the owner of a boat, contracts with B. to take a cargo of jute to Mirzapore for sale at that place, starting on a specified day. The boat, owing to some avoidable cause, does not start at the time appointed, whereby the arrival of the cargo at Mirzapore is delayed beyond the time when it would have arrived if the boat had sailed according to the contract. After that date, and before the arrival of the cargo, the price of jute falls. The measure of the compensation payable to B. by A. is the difference between the price which B. could have obtained for the cargo at Mirzapore at the time when it would have arrived, if forwarded in due course, and its market value at the time when it actually arrived.[544]

A. contracts to let his ship to B. for a year, from

January 1, for a certain price. Freights rise, and on January 1 the hire obtainable for the ship is higher than the contract price. A. breaks his promise. He must pay to B., by way of compensation, a sum equal to the difference between the contract price and the price for which B. could hire a similar ship for a year on and from January 1.[545]

A. hires B.'s ship to go to Bombay, and there takes on board, on January 1, a cargo which A. is to provide, and bring it to Calcutta, the freight to be paid when earned. B.'s ship does not go to Bombay, but A. has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. A. avails himself of these opportunities, but is put to trouble and expense in doing so. A. is entitled to receive compensation from B. in respect of such trouble and expense.[546]

Special Damages.—The owner of goods is not entitled to recover special damages against the carrier, unless he show that, at the time the goods were delivered to be carried, the circumstances out of which such damages arose were specially made known to the carrier in such a way as to lead to the conclusion that he then accepted the goods with the condition attached, viz. that in the event of a breach he should be liable for such special damage. This principle was laid down in the leading case of *Hadley* v. *Baxendale*, *ante* p. 340.[547]

But special damages cannot be recovered for any indirect, speculative, or remote loss or damage sustained by reason of the breach of contract. Thus, where a consignor, under a contract with his consignees for the delivery of goods by a particular day at an exceptional price, with power in the consignees to reject the goods and rescind the contract if not performed to the day, delivered to a railway company, *with full notice*, goods within the contract, and the company did not deliver them until after the time stipulated in the contract, and the consignees refused to receive them, it was held that the measure of damages was the difference between the market price of the goods on the day when they ought to have been delivered, and that on the day upon which they were delivered, and any incidental expenses to which the consignor may have been put in finding a customer and re-selling the goods; but that the company, under the notice they had received, were not liable to repay to the consignor the difference between the exceptional price mentioned in the contract and the price of re-sale.[548]

A. delivers to B., a common carrier, a machine to be conveyed without delay to A.'s mill, informing B. that his mill is stopped for want of the machine. B unreasonably delays the delivery of the machine, and A. in consequence loses a profitable contract with the Government. A. is entitled to receive from B., by way of compensation, the average amount of profit which

would have been made by the working of the mill during the time the delivery of it was delayed, but not the loss sustained throgh the loss of the Government contract.[549]

In Case of Luggage mis-sent.—The measure of damages in the case of loss of or detention to luggage rests upon the same rules of law as apply to goods. The case of *Battams* v. *The Great Eastern Railway Company*, lately tried in the Court of Exchequer, is an illustration of the law on this point.

The action was tried before Mr. Commissioner Kerr without a jury, and the judge, after hearing the opening, ruled that the plaintiff had suffered no damage for which he could recover at law, and entered judgment for the defendants. But a rule to review this decision was granted by Mr. Justice Bowen in Chambers. The facts are briefly these: The plaintiff and his two sisters started from Stony Stratford on December 31, 1878, to go to Dunmow to attend a ball given by his landlord, Lord Rosslyn. They had one portmanteau, which was labelled at St. Pancras for Dunmow. On changing carriages at Bishop Stortford the portmanteau was missing when the plaintiff asked for it, after the train had gone on to Norwich. He thereupon asked the station-master at Bishop Stortford to telegraph for the luggage; but that official declined, saying it would come down by next train. Thereupon the plaintiff and the ladies proceeded to Dunmow

and put up at the hotel; but no portmanteau arrived, and the party were unable to go to the ball. The following particulars of damage were set up:—Railway fare, 3*l.* 18*s.* 6*d.*; hotel bill, 4*l.* 10*s.*; cabs, 10*s.*; two ball dresses specially ordered, 14*l.*; loss of time, 5*l.*—27*l.* 18*s.* 6*d.* The portmanteau was ultimately sent back to Stony Stratford at the plaintiff's request.

Mr. Tennant, counsel for the defendants, said he should submit these damages were too remote.

Baron Pollock.—Take the case of a man going down to Liverpool to sell a horse out of which he might make 1*l.* profit and that of a man going to attend his grandmother's deathbed, knowing that those who attended it would receive 5,000*l.*; the first man might recover if delayed *en route*, but the grandson could not.

Baron Huddleston observed the plaintiff had been put to expense and thrown his fare away.

Mr. Tennant.—He ought to recover only such damages as naturally and usually follow from the breach of the contract (*Hadley* v. *Baxendale*, 9, *Ex.* 341), if, in fact, he has sustained any. He has not proved any inconvenience here from the delay, as in sleeping or shaving himself or from the loss of his toilet requisites. Now, there might be considerable inconvenience if these were lost on a journey away from home; but it is different if a person is homeward bound, where there is plenty of everything. There is no representation here of any special notice of the consequence of delay.

Baron Huddleston.—Was he to tell the porter confidentially that he was going down to Lord Rosslyn's ball?

Baron Pollock.—In the case of some peaches which were specially notified as going down to be sold on the Brighton racecourse, it was held that exceptional damages could be recovered.

Mr. Tennant.—The refusal of the station-master to telegraph at Bishop Stortford after breach of contract will not affect the damages (*Gee* v. *The Lancashire and Yorkshire Railway*).

Baron Huddleston said the plaintiff was kept at Dunmow for a day and a night.

Mr. Tennant replied that he would have been there that time in any event. The plaintiff could not recover for the ball dresses, though they were moderate enough, or for the disappointment of not attending the ball.

Baron Huddleston.—Cannot you agree on some sum if we think there is anything on which damages may be assessed? There must be something tangible; it must not be for mere vexation and loss of temper. If we send the case back for the Judge to assess damages, he may award the plaintiff a farthing and make him pay the costs.

Mr. Gore, counsel for the plaintiffs, thought the plaintiff was at least entitled to his hotel expenses, for he would have come back straight to town if he had known the portmanteau would not arrive.

Baron Pollock here handed down a written communication, which was after some discussion accepted. The terms were a verdict for the plaintiff—Damages, one guinea, costs of the case in the County Court, but no costs of this appeal.[550]

PART VIII.

PROCEDURE.

CHAPTER XIX.

OF SUITS BY OR AGAINST CARRIERS.

Jurisdiction of Courts.—Every suit brought by or against a carrier must be instituted in the court of the lowest grade competent to try it, and within the local limits of whose jurisdiction the cause of action arises; or the defendant at the time of the commencement of the suit actually and voluntarily resides, or carries on business, or personally works for gain; or the property in dispute is situate.

As an illustration. A. is a tradesman in Calcutta. B. carries on business in Delhi. B., by his agent in Calcutta, buys goods of A., and requests A. to deliver them to the East Indian Railway Company. A. delivers the goods accordingly in Calcutta. A. may sue B. for the price of the goods either in Calcutta, where the cause of action has arisen, or in Delhi, where B. carries on business.

Railway administrations, corporations, and companies are deemed to carry on business at their sole or principal offices in British India, or in respect of any cause of action arising at any place where they have also a subordinate office at such place.[551]

In suits for compensation for wrong done to person or moveable property, if the wrong was done within the local limits of one court and the defendant resides, or carries on business, or personally works for gain within the local limits of the jurisdiction of another court, the plaintiff may, at his option, sue in either of the said courts. If A., a passenger travelling on the line of a railway company whose principal office is at Howrah, is upset and injured at Allahabad by negligence imputable to the company, he may sue the company either at Howrah or at Allahabad.[552]

If a suit which may be instituted in more than one court is instituted in a court within the local limits of whose jurisdiction the defendant does not reside, or carry on business, or personally work for gain, the defendant may, after giving notice in writing to the other parties, apply to the court to stay proceedings; and if the court, after hearing such of the parties as desire to be heard, is satisfied that justice is more likely to be done by the suit being instituted in some other court, it may stay proceedings either finally or till further order. Every such application must be made before the issues are settled.[553]

Cause of Action means the whole cause of action, and includes every fact essential to the maintenance of the action. There are many pieces of evidence, and other things even more remote, which are essential to the successful maintenance of an action but are no part of its cause. The action is neither an independent right nor an excrescence from the right, but the right itself in its quality of judicial enforceability; and irrespective of the domicile of the defendant there is a complete forum wherever a place can be indicated to which the right and its breach can both be referred, because there is a whole cause of action.[554]

It has been ruled by the High Court of the North-Western Provinces that the cause of action arises where the facts that immediately cause the right to sue have accrued.[555]

The expression 'cause of action' does not necessarily mean a cause of action upon one entire contract, for there may be one cause of action upon a number of debts contracted at different times or on several transactions. Thus a carrier at Swindon contracted with M. to barge timber from the river wharf to London at 16*s*. per ton. It was necessary to haul the timber from the place where it lay to be loaded on board the barges, and at times, when the horses of M. were not on the spot, the carrier provided horses and hauled the timber, although that work was not part of his contract. In a suit for a balance of account including two items for haulage

brought by the carrier against M. it was held by the County Court of Swindon that the hauling of the timber and the carriage of it to London constituted but one cause of action, and that as such cause of action did not arise until the delivery of the timber in London, the Swindon Court had no jurisdiction.[556]

In an action by a carrier for freight or hire, the cause of action, in the absence of any agreement to the contrary, may be considered to arise at the place where the goods are delivered to the consignee, unless the consignor is responsible for the freight, in which case the latter may be sued in the Court within the local limits of whose jurisdiction he resides, or carries on business, or otherwise according to the terms of the contract.[557]

Parties to Actions.—It is a rule of positive law that a sufficient delivery to the carrier is a delivery to the consignee, and under the Contract Act such delivery at once invests the latter with the property in the goods, and he is therefore the proper person to sue the carrier for non-delivery of goods or other breach of contract. But in all such actions the question for the judge is 'at whose risk the goods were carried,' and 'by whom the freight for their carriage is to be paid.' So long as the goods are carried at the risk of the consignor there is no delivery to the consignee, and the right of action is with the former.

Where goods are carried bearing freight, the consideration for the performance of the carrier's share of

the contract—*i.e.* the freight—moves from the consignee, and he is in that case the proper person to institute the suit. An action is not maintainable by the sender of goods which have been booked to pay, unless they are addressed to himself or to his recognised agent as consignee, and no decree passed by a Court in a suit of the kind would bar another suit by the consignee in whom the property in the goods and the right of action are vested. When a consignor claims to be the proper person to sue on the ground that the nominal consignee is his agent or servant, the latter should be included as co-plaintiff and made a party to the action.[558]

Institution of Suit.—Every suit must be instituted by the presentation of a plaint to the proper court written in the language of the Court or (with the Court's permission) in English, and must contain (1) the name of the Court in which the suit is brought; (2) the name, description, and place of abode of the plaintiff, and also of the defendant as far as can be ascertained; (3) a plain and concise statement of the circumstances constituting the cause of action, and when and where it arose; and (4) a demand of the relief which the plaintiff claims.

The plaint must be subscribed by the plaintiff and his pleader (if any), and verified at the foot by the plaintiff, or some person proved to be acquainted with the facts of the case. A memorandum of the docu-

ments filed with the plaint must also be endorsed thereon or annexed thereto by the plaintiff.[559]

Written Statements.—The parties may, at any time before or at the first hearing of the suit, tender written statements of their respective cases, and the Court shall receive such statements and place them on the record.

Such written statements must be as brief as the nature of the case admits, and confined as much as possible to a simple narrative of the facts which the party presenting them believes to be material to the case, and which he either admits or believes he will be able to prove. The statements must be divided into paragraphs, numbered consecutively, each paragraph containing as near as may be a separate allegation. And they must be subscribed and verified in the same manner as a plaint.

Limitation of Suits.—The periods prescribed by Act xv. of 1877 for the limitation of suits in which carriers are likely to be concerned are as follows:—

(1) Upon a Statute, Act, Regulation, or Bye-law for a penalty or forfeiture: *One year* from the time when the penalty or forfeiture is incurred.

(2) By executors, &c., under Act xiii. of 1855 (Lord Campbell's Act) for compensation for death of a person caused by actionable wrong: *One year* from the date of the death of the person killed.

(3) For compensation for any other personal injury: *One year* from date of injury.

(4) Against a carrier for compensation for losing or injuring goods: *Two years* from when the loss or injury occurs.

(5) Against a carrier for compensation for delay in delivering goods: *Two years* from date when the goods ought to have been delivered.

(6) For hire of animals, vehicles, or boats: *Three years* from when the hire becomes due.

(7) Upon any contract to indemnify: *Three years* from when the plaintiff is actually damnified.

(8) For breach of an unregistered contract not in writing: *Three years* from date of breach.

(9) For breach of a registered contract: *Six years* from date of breach.

Court Fees are computed as follows:—

(1) In suits for money, damages, or compensation: *According to the amount claimed*, by the table of rates in the Court Fees Act of 1870.

(2) In suits for moveable property having a market value: *According to such value* at the date of presenting the plaint.

(3) Where such property has no market value: *The amount at which the relief sought is valued.*

(4) Copy or translation of a judgment or order of a Civil Court, not being a decree:—

If value of suit does not exceed 50 Rs.: Four annas.

If value of suit exceeds 50 Rs.: Eight annas.

If of a Criminal Court: Eight annas.

If of a High Court: One rupee.

(5) Copy of a decree or judgment of a Civil Court in suits not exceeding 50 Rs.: Eight annas.

If value of suit exceeds 50 Rs.: One rupee.

Copy of judgment of Criminal Court: Eight annas.

Copy of decree or order of High Court: Four rupees.

(6) *Mukhtarnama* or *Wakalatnama* (power of attorney):—

When presented for the conduct of one case in any Civil or Criminal Court of subordinate jurisdiction: Eight annas.

When presented to a High Court: Two rupees.

(7) *Application* for copy or translation of a judgment, decree, or order of any Civil or Criminal Court: One anna.

THE INDIAN RAILWAY ACT.

Act No. IV. of 1879.

An Act to consolidate and amend the law relating to Railways in India.

Preamble.

Whereas it is expedient to consolidate and amend the law relating to railways in India; It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

Short title.

1. This Act may be called 'The Indian Railway Act 1879.'

Local extent.

It extends to the whole of British India and, so far as regards subjects of Her Majesty the Empress of India, to the dominions of Princes and States in India in alliance with her said Majesty;

Commencement.

And it shall come into force on the first day of July, 1879.

Repeal of Acts.

2. On and from that day, the Acts specified in the first schedule hereto annexed shall be repealed.

All rules made, notifications published and powers conferred under any of such Acts, or any enactment thereby repealed, shall (so far as they are consistent herewith) be deemed to have been respectively made, published and conferred under this Act.

Nothing in the Carriers' Act, 1865, shall apply to carriers by railway.

Interpretation-clause.

3. In this Act, unless there be something repugnant in the subject or context,—

'Railway.'

'Railway' means a railway for the public conveyance of passengers or goods.

It includes—

(*a*) All land within the fences or other boundary-marks prescribed under section fifty-two;

(*b*) All lines of rail, sidings or branches worked over for the purposes of, or in connection with, a railway;

(*c*) All stations, offices, warehouses, fixed machinery and other works constructed for the purposes of, or in connection with a railway;

(*d*) All vessels and rafts used for the purpose of carrying on the traffic of a railway.

In section four, 'Railway' includes a railway under construction, and in the remaining part of this section and in the following sections (namely), six, eight, sixteen, twenty-five, thirty, thirty-three, thirty-four, forty to forty-six (both inclusive), fifty-two and fifty-three, 'Railway' includes a railway under construction and a railway not used for the public conveyance of passengers or goods:

'Railway administration.'

'Railway administration' means in the case of a railway worked by Government or a Native State, the Manager of such railway, and in the case of a railway worked by a Company or private individual, such Company or individual:

'Railway servant.'

'Railway servant' means any person employed by a railway administration, to perform any function in connection with a railway,

And in section twenty-five, last clause, sections twenty-six, twenty-seven, thirty-eight, and forty-two includes any person employed to perform any such function by any other person in execution of a contract into which he has entered with a railway administration.

Right to use locomotives.

4. It shall be lawful, with the previous sanction of the Governor-General in Council, to use on every railway locomotive engines or other motive power and carriages and waggons to be drawn or propelled thereby.

CHAPTER II.

DUTIES OF THE RAILWAY ADMINISTRATION.

Railway when to be opened.

5. No railway or portion or extension of, or addition to, a railway shall be opened for the public conveyance of passengers until the railway administration has given to the Governor-General in Council notice in writing of the intention of opening the same and until an officer appointed by the Governor-General in Council to inspect such railway, portion, extension, or addition has, after inspection thereof, reported in writing to the Governor-General in Council that in his opinion the opening of the same would not be attended with danger to the public using the same.

Accidents to be reported.

6. Every railway administration shall, within forty-eight hours after the occurrence upon the railway of—

(*a*) Any accident attended with loss of human life or serious injury to person or property,

(*b*) Any accident of a description usually attended with such loss or injury, and

(*c*) Any accident of any other description which the Governor-General in Council may, from time to time, direct to be notified,

Give notice thereof to the local government;

And the station-master nearest to the place at which the accident occurs, or, where there is no station-master, the officer in charge of the section of the railway on which the accident occurs, shall without unnecessary delay give notice in writing or by telegraph of such accident to the nearest magistrate and to the officer in charge of the police station, in the jurisdiction of which the accident occurs or to such other magistrate and police officer as the local government, from time to time, appoints in this behalf.

Returns of accidents.

7. Every railway administration shall make up and deliver to the Governor-General in Council a return of accidents occurring in the course of the public traffic upon the railway, whether attended with personal injury or not, in such form and manner, and at such intervals of time, as the Governor-General in Council from time to time directs.

General rules for working railway.

8. Every railway administration shall make general rules for the following purposes (that is to say):

(*a*) For regulating the mode in which, and the speed at which, carriages and waggons used on the railway are to be moved or propelled;

(*b*) For regulating the maximum number of passengers which each carriage and compartment may carry, and the mode in which such number shall be denoted thereon;

(*c*) For regulating the provision to be made for the accommodation and convenience of passengers;

(*d*) For declaring what shall be deemed to be, for the purposes of this act, dangerous goods; and

(*e*) Generally for regulating the travelling upon, and the use, working and management of, the railway;

And may, from time to time, alter any such rules.

Penalty for breach of rules.

Any such rule may contain a provision that any person committing a breach of it shall be liable to a fine which may extend to fifty rupees, or, in default of payment of such fine, to simple imprisonment for a term which may extend to two months.

No such rule shall take effect unless it is consistent with this Act and until it has received the sanction of the Governor-General in Council.

Notification of rules.

All rules made under this section shall be published in the 'Gazette of India,' and shall be otherwise notified to the railway servants and the public in such manner as the Governor-General in Council, from time to time, directs.

Power to cancel rules.

The Governor-General in Council may at any time cancel any such rule.

Copy and translation of Act, &c., to be shown at stations.

9. An abstract of this Act, and a copy of the time-tables and tariff of charges which may, from time to time, be published for any railway by any railway administration, shall be exhibited in some conspicuous place at each station of such railway, so that they may be easily seen and read.

All such documents shall be so exhibited in English and in the principal vernacular language of the district in which the station is situate, and in such other language, if any, as the Governor-General in Council may direct.

CHAPTER III.

CARRIAGE OF PROPERTY.

Special contract limiting liability.

10. Every agreement purporting to limit the obligation or responsibility imposed on a carrier by railway by the Indian Contract Act, 1872, sections 151 and 161, in the case of loss, destruction, or deterioration of, or damage to, property shall, in so far as it purports to limit such obligation or responsibility, be void unless—

(*a*) It is in writing signed by, or on behalf of, the person sending or delivering such property, and

(*b*) Is otherwise in a form approved by the Governor-General in Council.

No liability for loss of gold, silver, &c., unless value declared and increased charge accepted.

11. When any property mentioned in the second schedule hereto annexed is contained in any parcel or package delivered to a carrier by railway, the carrier shall not be liable for loss, destruction, or deterioration of, or damage to, such property, unless at the time of delivery the value and nature thereof have been declared by the person sending or delivering the same, and an increased charge for the safe conveyance of the same, or an engagement to pay such charge, has been accepted by some railway servant specially authorised in this behalf.

When any property of which the value and nature have been declared under this section has been lost, destroyed, or damaged, or has deteriorated, the compensation recoverable for such loss, destruction, damage, or deterioration shall not exceed the value so declared.

No liability for unbooked luggage.

12. A carrier by railway shall in no case be answerable for loss, destruction, or deterioration of, or damage to, any passenger's luggage, unless a railway servant has booked and given a receipt for the same.

Plaintiffs not required to prove negligence.

13. In any suit against a carrier by railway for compensation for loss, destruction, or deterioration of, or damage to, property delivered to a railway servant, it shall not be necessary for the plaintiff to prove in what manner such loss, destruction, deterioration, or damage was caused.

14. If any person fails to pay on demand any sum due by him to a carrier by railway for conveyance of any property or for demurrage or wharfage in respect of the same, the railway administration may detain the whole or any part of such property or, if the same have been removed from the railway, any other property of such person then on such railway or thereafter coming into the possession of the railway administration;

Lien for money due for carriage, &c., of property.

And may also sell by public auction, in the case of perishable property at once, and in the case of other property on the expiration of at least fifteen days' notice thereof published in one or more of the local newspapers or, where there are no such newspapers, in such manner as the local government may, from time to time, direct, sufficient of such property to produce the sum payable as aforesaid, and all charges and expenses of such detention, notice, and sale, or, if such person fails to remove from the railway within a reasonable time any property so detained, the whole of such property;

And may, out of the proceeds of the sale, retain the sum so payable, together with all charges and expenses aforesaid, rendering the surplus, if any, of such proceeds, and so much of the property (if any) as remains unsold, to the person entitled thereto;

Or such carrier may recover any such sum by suit.

15. The owner or person having the care of any property which has been carried upon any railway, or is brought into any station or warehouse for the purpose of being carried upon a railway, shall, on demand by any railway servant appointed in this behalf by the railway administration, deliver to him an exact account in writing signed by such owner or person, of the quantity and description of such property.

Written account of property to be given on demand.

16. No passenger shall take with him on a railway, and no person shall deliver or tender for carriage upon any railway, any dangerous luggage or goods without giving notice of their nature to a railway servant or, in the case of luggage or goods delivered or tendered for carriage, distinctly marking their nature on the outside of the package containing the same.

Dangerous goods.

Any railway servant may refuse to carry upon a railway any

luggage or parcel which he suspects to contain dangerous goods, and may require such luggage or parcel to be opened to ascertain the fact previously to carrying the same;

And in case any such luggage or parcel is received for the purpose of being carried upon a railway, any railway servant may stop the transit thereof until he is satisfied as to the nature of its contents.

CHAPTER IV.

CARRIAGE OF PASSENGERS.

Passengers on payment of fares to be furnished with tickets.

17. Every person desirous of travelling on a railway shall, upon payment of his fare, be furnished with a ticket specifying in English and the principal vernacular language of the district in which the ticket is issued, the class of carriage for which, and the place from and place to which, the fare has been paid, and the amount of such fare;

Tickets to be shown and given up on demand.

And every passenger shall, when required, show his ticket to any railway servant duly authorised to examine the same, and shall deliver up such ticket upon demand to any railway servant duly authorised to collect tickets.

Fares and tickets at intermediate stations.

18. At the intermediate stations, the fares shall be deemed to be accepted and the tickets furnished only upon condition that there be room in the train for which the tickets are furnished.

Preferential right of ticket-holders.

In case there is not room for all the passengers to whom tickets have been furnished, those who have obtained tickets for the longest distance shall have the preference; and those who have obtained tickets for the same distance shall have the preference according to the order in which they have received their tickets:

Proviso.

Provided that all officers and troops of Her Majesty on duty, and all other persons on the business of the Government who, by virtue of any contract with the Government or, in the case of a railway worked by Government, of any direction of the Governor-General in Council, are entitled

to be conveyed on a railway in preference to, or in priority over, the public, shall be entitled to such preference and priority without reference to the distance for which, or the order in which, they have received their tickets.

Any passenger to whom a ticket has been furnished at any station and for whom there is no room shall, on returning the ticket within a reasonable time after its issue, be entitled to have his fare at once refunded.

Fares to be prepaid.

19. Except with the permission of the railway administration or of such officer as it appoints in this behalf, no person shall enter any carriage used on any railway for the purpose of travelling therein without having first paid his fare and obtained a ticket.

Power to remove persons suffering from infectious disease.

20. Any passenger found suffering from an infectious disease in a railway carriage or in any place on a railway may, if his remaining in such carriage or place is likely to spread the infection of such disease, be removed from such carriage or place by any railway servant;

Any passenger so removed who has paid his proper fare to or at the place at which he is so removed, shall be entitled on returning his ticket to have such fare refunded.

CHAPTER V.

OFFENCES AND PROCEDURE.

(*A.*)—*Offences by the Railway Administration.*

Penalty for opening railway in contravention of section 5.

21. Any railway administration opening, in contravention of section five, any railway, or any portion or extension of, or addition to, a railway, shall forfeit to Government the sum of one thousand rupees for every day during which the same continues open in contravention of that section.

For omitting to report accident.

22. Any railway administration omitting to give notice as required by section six, shall forfeit to Government the sum of one hundred rupees for every day during which such omission continues.

23. Any railway administration failing to deliver any return mentioned in section seven within fourteen days after the same ought to be delivered, or to make or notify any rules as required by section eight, or to exhibit any abstract or copy mentioned in section nine in manner required by that section, shall forfeit to Government the sum of fifty rupees for every day during which such failure continues.

For not sending return of accidents or making rules under section 8, or exhibiting copy under section 9.

(B.)—*Offences by Railway Servants.*

For omitting to give notice of accident.

24. Any station-master or other person omitting to give notice as required by section six, shall be punished with fine which may extend to fifty rupees.

For drunkenness or breach of duty.

25. Any railway servant who is in a state of intoxication whilst actually employed upon a railway in the discharge of any duty, or who negligently omits to perform his duty, or who performs the same in an improper manner,

Shall be punished with a fine which may extend to fifty rupees;

Or if the duty in any of the cases aforesaid be such that the negligent, omission or improper performance thereof would be likely to endanger the safety of any person travelling or being upon such railway, such servant shall be punished with imprisonment for a term which may extend to one year, or with fine, or with both.

For endangering the safety of persons:

26. If any railway servant in the discharge of his duty endangers the safety of any person—

(*a*) By disobeying any general rule sanctioned and published and notified in the manner prescribed by section eight; or

(*b*) By disobeying any rule or order not inconsistent with the general rules aforesaid, and which such servant was bound by the terms of his employment to obey, and of which he had notice; or

(*c*) By any rash or negligent act or omission,

He shall be punished with imprisonment for a term which may extend to three years, or with fine which may extend to five hundred rupees, or with both.

For receiving bribes:

27. Every railway servant shall be deemed a 'public servant' within the meaning of sections 161, 162, 163, 164, and 165 of the Indian Penal Code.

Amendment of Penal Code, section 161.

In the definition of legal remuneration contained in the said section 161, the word 'Government' shall, for the purposes of this section, be deemed to include any employer of a railway servant as such.

For compelling passengers to enter carriages already full.

28. Any railway servant who compels or attempts to compel any passenger to enter a carriage or compartment containing the maximum number of passengers denoted thereon in accordance with a rule made and notified under section eight, shall be punished with fine which may extend to one hundred rupees.

(*C.*)—*Offences by Persons generally.*

For not giving account of goods or giving false account.

29. Any person required under section fifteen to give an account of the quantity and description of any property who neglects or refuses to give such account,

Or who wilfully gives a false account,

Shall be punished with fine which may extend to five rupees for every maund (of 3,200 tolahs) of such property; and such fine shall be in addition to any charge to which such property may be liable.

For taking dangerous goods on railway or delivering such goods without notice.

30. Whosoever, in contravention of section sixteen, takes with him any dangerous goods on a railway, or delivers or tenders any such goods for the purpose of being carried upon a railway, shall be punished with fine which may extend to two hundred rupees.

For travelling without ticket or not showing or delivering up ticket.

31. Any passenger travelling on a railway without a proper ticket or having such a ticket and not showing or delivering up the same when so required under section seventeen, shall be liable to pay the fare of the class in which he is found travelling, from the place whence the train originally started, unless he can prove that he has travelled a less distance only, in which case he shall be liable to pay the fare of the class aforesaid only from the place whence he has travelled.

Every such fare shall, on application by a railway servant to a

magistrate, and on proof of the passenger's liability, be recoverable from such passenger as if it were a fine, and shall, when recovered, be paid to the railway administration.

For evading payment of fare.

32. Any person who defrauds, or attempts to defraud, any carrier by railway—

(*a*) By travelling, or attempting to travel, on any railway without having previously paid his fare;

(*b*) By riding or attempting to ride in or on a carriage, or by a train, of a higher class than that for which he has paid his fare;

(*c*) By using or attempting to use a ticket on any day for which such ticket is not available;

(*d*) By continuing his journey in or upon any carriage beyond the place to which he has paid his fare, without previously paying the fare for the additional distance;

Or who, in any other manner whatever, attempts to evade the payment of his fare,

For altering ticket.

Or who wilfully alters or defaces his ticket so as to render the date, number, or other material portion thereof illegible,

Shall be punished with fine which may extend to fifty rupees, and shall also be liable to pay the fare (if any) which he ought to have paid; and such fare shall be recoverable in manner provided by section thirty-one, and shall, when recovered, be paid to the railway administration.

For entering carriage in motion.

33. Any passenger who gets into or upon, or attempts to get into or upon, or quits or attempts to quit, any carriage upon any railway, while such carriage is in motion, shall be punished with fine which may extend to twenty rupees;

For riding on the steps.

And any passenger who rides, or attempts to ride, on the steps, or any other part of a carriage upon any railway, except on those parts which are intended for the accommodation of passengers,

Shall be punished with fine which may extend to fifty rupees.

For riding on engine, tender, &c.

34. Any person who, without the permission of the railway administration, rides or attempts to ride upon any locomotive-engine or tender upon any railway; or in or upon any vehicle not appropriated to the carriage of passengers,

Shall be punished with fine which may extend to one hundred rupees.

For smoking.

35. Any person who, without the consent of his fellow-passengers, if any, in the same compartment, smokes in or upon any railway-carriage, except in a carriage or compartment specially provided for the purpose, shall be punished with fine which may extend to twenty rupees;

And any person who persists in so smoking (except as aforesaid) after being warned by any railway servant to desist may, in addition to incurring the liability above-mentioned, be removed by any railway servant from any such carriage and from the premises of the railway, and where he has paid his fare and obtained a ticket, shall forfeit such fare and ticket.

For intoxication or nuisance.

36. Any person who is in a state of intoxication, or who commits any nuisance or act of indecency in any railway carriage, or upon any part of any railway;

Or who wilfully and without lawful excuse interferes with the comfort of any passenger, or extinguishes any lamp in any railway carriage,

Shall be punished with fine which may extend to fifty rupees; and may be removed by any railway servant from any such carriage, and also from the premises of the railway, and, where he has paid his fare and obtained a ticket, shall forfeit such fare and ticket.

For entering carriage or room reserved for females.

37. If any carriage, compartment, room or place be reserved by the railway administration for the exclusive use of females, any male person who without lawful excuse enters such carriage, compartment, room or place knowing the same to be reserved as aforesaid, or remains therein after having been informed of its having been so reserved, shall be punished with fine which may extend to one hundred rupees.

And may be removed therefrom, and also from the premises of the railway, by any railway servant,

And, where he has paid his fare and obtained a ticket, shall forfeit such fare and ticket.

For obstructing railway servant in his duty.

38. Whoever wilfully obstructs or impedes any railway servant in the discharge of his duty, shall be punished with fine which may extend to one hundred rupees.

For entering carriage already full.

39. Any passenger wilfully entering a carriage or compartment containing the maximum number of passengers which has been denoted thereon in accordance with a rule made and notified under section eight, shall be punished with fine which may extend to one hundred rupees.

For removing signals or injuring carriages, &c.

40. Any person who without authority or reasonable excuse makes, alters, shows, hides, removes or extinguishes any signal or light upon any railway, or upon any engine, carriage, waggon or other vehicle upon a railway,

Or who negligently damages any engine, carriage, waggon or other vehicle belonging to a railway, or any warehouse, building, machine, fence or other thing so belonging,

Or who needlessly interferes with the means of communication provided in any train between the guard and the engine-driver or passengers,

Shall be punished with fine which may extend to one hundred rupees.

For trespass.

For refusing to leave on request.

41. Any person who unlawfully enters upon a railway shall be punished with fine which may extend to twenty rupees; and if any person so entering refuses to leave such railway on being requested to do so by any railway servant, or by any other person on behalf of the railway administration, he shall be punished with fine, which may extend to fifty rupees, and may be immediately removed from such railway by such servant or other person as aforesaid.

For cattle-trespass within railway fences.

42. The owner or person in charge of any bulls, cows, bullocks, calves, elephants, camels, buffaloes, horses, mares, geldings, ponies, colts, fillies, mules, asses, pigs, rams, ewes, sheep, lambs, goats and kids straying on any railway provided with fences suitable for the exclusion of such animals, shall be punished with fine which may extend to ten rupees for each animal, in addition to any amount that may be recovered under the Cattle Trespass Act, 1871.

For wilfully driving cattle on fenced railway.

Whenever any such animals are wilfully and unlawfully driven, or knowingly and unlawfully permitted to be, on any railway provided with fences suitable for the exclusion of such animals,

And whenever any such animals are wilfully driven, or knowingly permitted to be, on any railway not so provided, otherwise than for the purpose of lawfully crossing the railway, or for any other lawful purpose,

On unfenced railway.

The person in charge of such animals, or if he cannot be identified, then the owner of the said animals, shall be punished with fine which may extend to fifty rupees for each animal, in addition to any amount that may be recovered, under the same Act.

Recovery of fines and payment of compensation.

All fines imposed under this section may, if the convicting magistrate so direct, be recovered in manner provided by section twenty-five of the said Cattle Trespass Act, 1871, and may be appropriated in whole or in part in compensation for loss or damage proved to his satisfaction.

Amendment of Act I. of 1871, sections 11 and 26.

The expression 'public road' in sections eleven and twenty-six of the same Act shall be deemed to include a railway. And any railway servant may exercise the powers of seizure provided by the said section eleven.

For opening or not properly shutting gates.

43. Whoever knowing or having reason to believe that any engine or train is approaching along a railway opens any gate which the railway administration has set up on either side of the railway across any road for the use or accommodation of any person, or passes or attempts to pass, or drives or takes, or attempts to drive or take, any vehicle, animal or other thing across the railway;

And whoever at any time, in the absence of a gatekeeper, omits to shut and fasten such gate as soon as he and any vehicle, animal or other thing under his charge have passed through the same,

Shall be punished with fine which may extend to fifty rupees.

For minors obstructing line or throwing stones at train.

44. Whenever any minor under twelve years of age unlawfully—

(*a*) Places or throws, or attempts to place or throw, upon or across a railway any wood, stone, or other thing, or

(*b*) Removes or displaces, or attempts to remove or displace, any rail, sleeper, spike, key, or other thing belonging to the permanent way of a railway, or

(*c*) Throws or causes to fall, or attempts to throw or cause to

fall against, into or upon any engine, tender, carriage or other vehicle used upon a railway, any wood, stone or other thing,

Such minor shall be deemed guilty of an offence, and the convicting magistrate may, in his discretion, direct either that the minor, if a male, shall be punished with whipping, or that the father or guardian of the minor shall, within such reasonable time as the magistrate may fix, execute a bond binding himself in such penalty as the magistrate may direct, to prevent the minor from repeating such offence.

The amount of such bond, if forfeited, shall be recoverable as if it were a fine.

Any person neglecting or refusing to execute a bond when required under this section so to do, shall be punished with fine which may extend to fifty rupees.

For wilful act or omission endangering persons on railway.

45. Whoever wilfully does any act, or wilfully omits to do what he is legally bound to do, intending by such act or omission to endanger, or knowing that he is thereby likely to endanger, the safety of any person travelling or being upon any railway, shall be punished with transportation (or in the case of an European or American, penal servitude) for a term of not less than seven years or with imprisonment for a term which may extend to ten years.

For rash or negligent act.

46. Whoever rashly or negligently does any act, or omits to do what he is legally bound to do, and such act or omission is likely to endanger the safety of any person travelling or being upon a railway, shall be punished with imprisonment for a term which may extend to one year, or with fine, or with both.

Disobedience of omnibus, &c., drivers to railway servants.

47. Every driver or conductor of an omnibus, carriage or other vehicle shall, while in or upon any station-yard or other premises forming part of a railway, obey the reasonable directions of any railway servants duly authorised in this behalf; and every person offending against this section shall be punished with fine which may extend to twenty rupees.

(D.)—*Arrest of Offenders.*

48. If any person commits any offence punishable under this Act and there is reason to believe that he will abscond or his name and address are unknown, and he refuses to give his name and address, or there is reason to believe that the name or address given by him is incorrect, any railway servant or police officer, or any other person whom such railway servant or police officer may call to his aid, may, without any warrant or written authority, arrest and detain such offender until he can be taken before a magistrate or give sufficient security for his appearance before such magistrate, or is otherwise discharged by due course of law.

Arrest for offences punishable under this Act of offender whose name is unknown, &c.

49. Every person committing any offence mentioned in sections eight, twenty-five, twenty-six, thirty-six, thirty-seven, thirty-eight, forty-four, forty-five and forty-six, may be arrested without any warrant or written authority by any railway servant or police officer, or by any other person whom such servant or officer may call to his aid;

Arrest for offences against certain sections.

And every person so arrested shall, without unnecessary delay, be taken before a magistrate authorised to punish him or to commit him for trial.

(E.)—*Jurisdiction.*

50. No magistrate other than a Presidency magistrate and a magistrate whose powers are not less than those of a magistrate of the second class shall try any offence under this Act.

Magistrates having jurisdiction.

Any person committing any offence against this Act or the rules made under it, shall be triable for such offence in any place in which he may be found or which the Local Government may, from time to time, notify in this behalf, as well as in any other place in which he might be tried under any law for the time being in force.

Place of trial.

Every notification under this section shall be published in the local official Gazette, and a copy thereof shall also be exhibited in some conspicuous place at each of such railway stations as the Local Government may direct, so that it may be easily seen and read.

(F.)—Saving of other Criminal Laws.

Saving of prosecutions under other laws.

51. Nothing in this Act shall be deemed to prevent any person from being arrested, prosecuted or punished under any other law for any act or omission which constitutes an offence against this Act or the rules made under it.

Provided that no person shall be punished twice for the same offence.

CHAPTER VI.

MISCELLANEOUS.

Power of Government to make rules as to fences, gates, and bars.

52. The Governor-General in Council, or the Local Government with the previous sanction of the Governor-General in Council, may, from time to time, make rules requiring—

(*a*) That boundary-marks or fences be provided for any railway or any part thereof, and for roads constructed in connection therewith;

(*b*) That gates or bars be erected at places where any railway crosses a road on the level; and

(*c*) That persons be employed to open and shut such gates or bars;

And may by such rules determine what kind of fences shall, for the purposes of section forty-two, be deemed to be suitable for the exclusion of cattle,

And direct that any railway administration wilfully neglecting or violating any rule made under this section, shall forfeit to Government a sum not exceeding five hundred rupees for every such neglect or violation, or, when such neglect or violation is continuous, for every day during which it continues.

Power to declare Local Government in respect of any Railway.

53. The Governor-General in Council may, from time to time, by notification in the 'Gazette of India,' declare what Government or other authority shall be deemed to be, for the purposes of this Act, the Local Government in respect of the whole or any part of a railway.

Power to extend Act to steam-tramways.

54. The Governor-General in Council may, by notification, extend this Act or any portion thereof to any tramway worked by steam.

THE FIRST SCHEDULE.

ACTS REPEALED.

(*See Section* 2.)

Number and year.	Title.
XVIII. of 1854	An Act relating to Railways in India.
XXXI. of 1867	An Act to render penal certain offences committed by servants of Railway Companies.
XIII. of 1870	An Act to apply the provisions of Act No. XVIII. of 1854 to Railways belonging to, or worked by, Government.
XXV. of 1871	An Act to amend the Railway Act.

THE SECOND SCHEDULE.

(*See Section* 11.)

(*a*) Gold or silver, coined or uncoined, manufactured or unmanufactured;

(*b*) Plated articles;

(*c*) Cloths and tissue and lace of which gold or silver forms part;

(*d*) Precious stones, jewellery, trinkets;

(*e*) Watches, clocks, or timepieces, of any description;

(*f*) Government securities;

(*g*) Government stamps;

(*h*) Bills of exchange, hundis, promissory notes, bank-notes, orders, or other securities for payment of money;

(*i*) Maps, writings, title-deeds;

(*j*) Paintings, engravings, lithographs, photographs, carvings, sculpture, and other works of art;

(*k*) Glass, china, marble;

(*l*) Silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials;

(*m*) Shawls;

(*n*) Lace;

(*o*) Opium;

(*p*) Ivory, ebony, sandalwood, sandalwood-oil;

(*q*) Musical and scientific instruments.

ACT No. XIII. of 1855.

PASSED BY THE LEGISLATIVE COUNCIL OF INDIA.

(*Received the assent of the Governor-General on March* 27, 1855.)

An Act to provide compensation to families for loss occasioned by the death of a person caused by actionable wrong.

WHEREAS no action or suit is now maintainable in any Court against a person who, by his wrongful act, neglect, or default, may have caused the death of another person, and it is oftentimes right and expedient that the wrong-doer in such case should be answerable in damages for the injury so caused by him It is enacted as follows:—

I. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued, shall be liable to an action or suit for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony or other crime. And it is enacted further, that every such action or suit shall be for the benefit of the wife, husband, parent and child, if any, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor, adminis-

trator or representative of the person deceased; and in every such action, the Court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought and the amount so recovered, after deducting all costs and expenses, including the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties, or any of them, in such shares as the Court by its judgment or decree shall direct.

II. Provided always that not more than one action or suit shall be brought for and in respect of the same subject matter of complaint, and that every such action shall be brought within twelve calendar months after the death of such deceased person; provided that, in any such action or suit, the executor, administrator or representative of the deceased may insert a claim for and recover any pecuniary loss to the estate of the deceased occasioned by such wrongful act, neglect or default, which sum, when recovered, shall be deemed part of the assets of the estate of the deceased.

III. The plaint in any such action or suit shall give a full particular of the person or persons for whom, or on whose behalf, such action or suit shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered.

IV. The following words and expressions are intended to have the meanings hereby assigned to them respectively, so far as such meanings are not excluded by the context or by the nature of the subject-matter, that is to say, words denoting the singular number are to be understood to apply also to a plurality of persons or things, and words denoting the masculine gender are to be understood to apply also to persons of the feminine gender; and the word 'person' shall apply to bodies politic and corporate; and the word 'parent' shall include father and mother, and grandfather and grandmother; and the word 'child' shall include son and daughter, and grandson and granddaughter, and step-son and step-daughter.

ACT III., 1865: COMMON CARRIERS.

An Act relating to the rights and liabilities of Common Carriers.

WHEREAS it is expedient not only to enable Common Carriers to limit their liability for loss of, or damage, to property delivered to them to be carried, but also to declare their liability for loss of, or damage to, such property occasioned by the negligence or criminal acts of themselves, their servants or agents: It is enacted as follows:—

I. This Act may be cited as 'The Carriers' Act, 1865.'

II. In this Act, unless there be something repugnant in the subject or context,

'Common Carrier' denotes a person, other than the Government, engaged in the business of transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately.

'Person' includes any association or body of persons, whether incorporated or not.

Words in the singular number include the plural, and words in the plural include the singular.

III. No Common Carrier shall be liable for loss of, or damage to, property delivered to him to be carried, exceeding in value one hundred rupees, and of the description contained in the schedule to this Act, unless the person delivering such property to be carried, or some person duly authorized in that behalf, shall have expressly declared to such Carrier or his agent the value and description thereof.

IV. Every such Carrier may require payment for the risk undertaken in carrying property exceeding in value one hundred rupees, and of the description aforesaid, at such rate of charge as he may fix: Provided that, to entitle such Carrier to payment at a rate higher than his ordinary rate of charge, he shall have caused to be exhibited in the place where he carries on the business of receiving property to be carried, notice of the higher rate of charge required, printed or written in English and in the vernacular language of the country wherein he carries on such business.

V. In case of the loss of, or damage to, property exceeding in value one hundred rupees, and of the description aforesaid,

delivered to such Carrier to be carried, when the value and description thereof shall have been declared and payment shall have been required in manner provided for by this Act, the person entitled to recover, in respect of such loss or damage, shall also be entitled to recover any money actually paid to such Carrier in consideration of such risk as aforesaid.

VI. The liability of any Common Carrier for the loss of, or damage to, any property delivered to him to be carried not being of the description contained in the Schedule to this Act, shall not be deemed to be limited or affected by any public notice; but any such Carrier, not being the owner of a railroad or tramroad constructed under the provisions of Act XXII. of 1863 (*to provide for taking lands for works of public utility to be constructed by private persons or Companies, and for regulating the construction and use of works on land so taken*) may, by special contract, signed by the owner of such property so delivered as last aforesaid or by some person duly authorised in that behalf by such owner, limit his liability in respect of the same.

VII. The liability of the owner of any railroad or tramroad constructed under the provisions of the said Act XXII. of 1863, for the loss of, or damage to, any property delivered to him to be carried, not being of the description contained in the Schedule to this Act, shall not be deemed to be limited or affected by any special contract; but the owner of such railroad or tramroad shall be liable for the loss of, or damage to, property delivered to him to be carried, only when such loss or damage shall have been caused by negligence or a criminal act on his part, or on that of his agents or servants.

VIII. Notwithstanding anything hereinbefore contained, every Common Carrier shall be liable to the owner for loss of, or damage to, any property delivered to such Carrier to be carried, where such loss or damage shall have arisen from the negligence or criminal act of the Carrier or any of his agents or servants.

IX. In any suit brought against a Common Carrier for the loss, damage or non-delivery of goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the Carrier, his servants or agents.

X. Nothing in this Act shall affect the provisions contained in

Sections 9, 10, and 11 of Act No. XVIII. of 1854 (*relating to Railways in India*).

SCHEDULE.

Gold and Silver Coin.

Gold and Silver in a manufactured or unmanufactured state.

Precious Stones and Pearls.

Jewellery.

Timepieces of any description.

Trinkets.

Bills and Hundis.

Currency Notes of the Government of India or Notes of any Banks, or Securities for payment of money, English or Foreign.

Stamps and Stamped-paper.

Maps, Prints, and Works of Art.

Title-Deeds.

Gold or Silver Plates or Plated articles.

Glass.

China.

Silk in a manufactured state, and whether wrought up or not wrought up with other materials.

Shawls and Lace.

Clothes and tissues embroidered with precious metals or of which such metals form part.

Articles of ivory, ebony, or sandal-wood.

NOTES.

1. Pothier's Pandects, Lib. 4, Tit. 2.
2. Dig. Lib. 4, Tit. 9, 16.
3. Inst. Justin. Lib. 4, Tit. 6, 3.
4. Pothier's Pandects, Lib. 4, Tit. 9, 4 ; 4 Kent's Comm. 592.
5. Coggs *v.* Bernard, 3 Lord Raym. 909.
6. Riley *v.* Horne, 5 Bing. 217.
7. Code Napoleon—Civil—Art, 1782, 1784, 1929, 1954
8. 17 Suth. W. Rep. Calcutta, 90.
9. Jeytu Nund *v.* Punjaub R. C. ; Punjaub L. R. 1868, 227.
10. Kuverji Tulsidass *v.* Great Indian Peninsular R. C., 3 India L. R. (Bombay) par. 4, 189.
11. Redhead *v.* Midland R. C., 2 L. R., Q. B. 412.
12. Gisborne *v.* Hurst, 1 Salk. 249.
13. Fuller *v.* Bradley, 25 Penn St., 120 (U.S.).
14. Crouch *v.* London and North Western R. C., 14 C. B. 255.
15. Ansell *v.* Waterhouse, 2 Chit. 1.
16. Pickford *v.* Grand Junction R. C., 10 M. and W. 399.
17. Post-Master Bareily *v.* Earle, Sp. App. 726 of 1871, High Court N. W. P. Rep. 195.
18. Indian Contract Act, ss. 151 and 158.
19. Broom's Comm. Com. Law, 259.
20. Martin *v.* Great Indian Peninsular R. C., 3 L. R., Exch. 9.
21. *In re* Eastern Bengal R. C., 17 Suth. W. Rep. 240.
22. Indian Contract Act (1872), ss. 17, 18, 19, and 55 ; Yates *v.* Duff, 5 C. and P. 369.
23. Post-Master Bareily *v.* Earle, *supra.*
24. Indian Railway Act (1879), s. 10.

25. Indian Carriers' Act (1865), s. 6.
26. Peek *v.* North Staffordshire R. C., 32 L. J., Q. B. (App. House of Lords) 269; Simons *v.* Great Western R. C., 26 L. J., C. P. 25.
27. Lewis *v.* Great Western R. C., 29 L. J., Exch. 425; 5 H. and N. 867.
28. Beale *v.* South Devon R. C., 5 H. and N. 875; 29. L. J., Exch. 441; Low *v.* Midland R. C., 2 L. R., C. P. 339.
29. Beale *v.* South Devon R.C., *supra.*
30. Austin *v.* Manchester R. C., 10 C. B. 475.
31. Wren *v.* Eastern Counties R. C., 26 L. J., Q. B. 5.
32. Simons *v.* Great Western R. C., 26 L. J., C. P. 25.
33. Peek *v.* North Staffordshire R. C., 32 L. J., Q. B. 241.
34. Lewis *v.* Great Western R. C., 29 L. J., Exch. 425.
35. Jordan *v.* East Indian R. C., 14 Suth. W. Rep. 11.
36. Gallin *v.* London and North-Western R. C., 10 L. R., Q. B. 212; McCawley *v.* Furness R. C., 8 L. R., Q. B. 57.
37. Allday *v.* Great Western R. C., 34 L. J., Q. B. 5; Peek *v.* North Staffordshire R. C., 32 L. J., Q. B. 241.
38. McManus *v.* Lancaster and York R. C., 21 L. J., Exch. 359.
39. Simons *v.* Great Western R. C., 26 L. J., C. P. 25; Garton *v.* Bristol and Exeter R. C., 30 L. J., Q. B. 273.
40. Bristol and Exeter R. C. *v.* Collins, 7 House of Lords Cases, 231.
41. *Per* Mansfield, C. J., in Christie *v.* Griggs, 2 Camp. 79.
42. Aston *v.* Heaven, 3 Esp. 533.
43. Protab Daji *v.* Bombay, Baroda, and Central Indian R. C., 1 High Court Rep. (Bombay) 52.
44. Great Northern R. C. *v.* Harrison, 10 Exch. 376.
45. McCawley *v.* Furness R. C., 8 L. R., Q. B. 57; Gallin *v.* London and North-Western R. C., 10 L. R., Q. B. 212.
46. Phil. and Reading R. C. *v.* Derby, 11 How. 468 (U.S.).
47. Daniel *v.* Metropolitan R. C., 5 L. R., C P. 45.
48. Bennett *v.* Peninsular and Oriental Steam Nav. Co., 18 L. R., C. P. 85.
49. Hawcroft *v.* Great Northern R. C., 8 L. R., Q. B. 362; Story on Bailments—'Carriers'; Chitty on Con. 242.
50. Indian Railway Act (1879), ss. 17 and 18.
51. Hawcroft *v.* Great Northern R. C., *supra.*

52. Redhead *v.* Midland R. C., 20 L. J. 628; Israel *v.* Clark, 4 Esp. 259; Crofts *v.* Waterhouse, 3 Bing. 321.
53. Grote *v.* The Chester and Holyhead R. C., 2 L. J., Exch. 251, 24 L. J., C. P. 209.
54. Redhead *v.* Midland R. C., 20 L. J., 628; 8 B. & S. 371.
55. Stokes *v.* Eastern Counties R. C., 2 F. & F. 691, *per* Cockburn, C. J.
56. Sharp *v.* Gray, 9 Bing. 457.
57. Pickford *v.* Grand Junction R. C., 8 M. & W. 372.
58. Brien *v.* Bennett, 8 C. & P. 724.
59. Messiter *v.* Cooper, 4 Esp. 260.
60. Great Northern R. C. *v.* Harrison, 23 L. J., Exch. 308.
61. Indian Railway Act (1879), ss. 20, 36.
62. Prendergast *v.* Compton, 8 L. J., C. P. 454.
63. Jencks *v.* Coleman, 2 Sumner 224 (U.S.).
64. Indian Railway Act (1879), ss. 20, 35, 36, and 37.
65. Cappin *v.* Braithwaite, 8 Jur. 875; Prendergast *v.* Compton, 8 L. J., C. P. 454.
66. Hamlin *v.* Great Northern R. C., 1 H. & N. 408; Briddon *v.* Great Northern R. C., 28 L. J., Exch. 51.
67. *Re* Trent Nav. Co. 3 Esp. 132; Story on Bailments, s. 476.
68. Merchant Shipping Act, ss. 31 to 45.
69. Boyce *v.* Bayliffe, 1 Camp. 60.
70. Jones on Bailments, 21, 22.
71. Broom's Phil. of Law, 180.
72. Lord *v.* Midland R. C., 2 L. R., C. P. 344.
73. Indian Penal Code, s. 52.
74. Vaughan *v.* Menlove, 3 Bing. 468; Jones on Bailments, 6.
75. Act XIII. of 1855 Leg. Council of India. *Appendix.*
76. Read *v.* Great Eastern R. C., 3 L. R., Q. B. 555; Broom's Phil. of Law, 189.
77. Skinner *v.* London Brighton and South Coast R. C., 5 L. R., Exch. 787; Carpue *v.* London and Brighton R. C., 5 L. R., Q. B. 747.
78. Suth. Dig. Indian L. R. (Calcutta) 310.
79. Skinner *v.* London Brighton and South Coast R. C., *supra.*
80. Bridge *v.* Grand Junction R. C., 3 M. & W. 248; Martin *v.* Great Northern R. C., 16 C. B. 179; Rigby *v.* Hewitt, 5 L. R., Exch. 243; Broom's Comm. Com. L. 695.

81. Richardson *v.* Metropolitan R. C., 37 L. J., C. P. 300.
82. Fordham *v.* London Brighton and South Coast R. C., 37 L. J., C. P. 176.
83. Gardner *v.* Grace, 1 F. & F. 359.
84. Waite *v.* North-Eastern R. C., 27 L. J., Q. B. 417; Broom's Phil. of Law, 184.
85. Thoroughgood *v.* Bryan, 18 L. J., C. P. 336.
86. Clay *v.* Wood, 4 Esp. 44; Mayhew *v.* Boyce, 1 Stark, 432.
87. Chaplin *v.* Hawes, 3 C. & P. 554.
88. Crofts *v.* Waterhouse, 3 Bing. 319; Christie *v.* Griggs, 2 Camp. 79.
89. Latch *v.* Rummer R. C., 27 L. T., Exch. 155.
90. Rigby *v.* Hewitt, 19 L. J., Exch. 291.
91. Great Northern R. C. *v.* Harrison, 10 L. R., Exch. 376.
92. Protab Daji *v.* Bombay, Baroda, and Central India R. C., 1 High Court, L. Rep. (Bombay) 52.
93. Lygo *v.* Newhold, 23 L. J., Exch. 108.
94. Austin *v.* Great Northern R. C., 3 L. R., Q. B. 412.
95. Whitehouse *v.* Midland R. C., 30 J. P. 760.
96. Collet *v.* London and North-Western R. C., 16 L. J., Q. B. 984.
97. Great Northern R. C. *v.* Harrison, *supra.*
98. Phil. and Reading R. C. *v.* Derby, 11 How. 468 (U.S.).
99. Marshall *v.* Newcastle and Berwick R. C., 11 C. B. 655; 21 L. J., C. P. 34; Austin *v.* Great Western R. C., 2 L. Rep., Q. B. 445.
100. Aston *v.* Heaven, 2 Esp. 533; Christie *v.* Griggs, 2 Camp. 79.
101. Withers *v.* North Kent R. C., 27 L. J., Exch. 417.
102. Redhead *v.* Midland R. C., 20 L. J. 628.
103. Manser *v.* Eastern Counties R. C., 9 L. R., Exch. 585.
104. Cummings *v.* Great Northern R. C., 'Times' L. R. C. P., April 30, 1880.
105. Skipp *v.* Eastern Counties R. C., 9 L. R., Exch. 223; Broom's Comm. Com. L. 714.
106. Wilson *v.* Merry, 19 L. T. (House of Lords) 30.
107. Webb *v.* Rennie *et alios*, 4 F. and F. 612.
108. Broom's Comm. Com. L. 714.
109. Walter *v.* South-Eastern R. C., 32 L. J., Exch. 205.

110. Graham *v.* North-Eastern R. C., 18 L. J., C. B. 229.
111. Swainson *v.* North-Eastern R. C., 37 L. J., Exch. 102.
112. Sharrod *v.* London and North-Western R. C., 4 L. J., Exch. 580.
113. Machu *v.* London and South-Western R. C., 2 L. J., Exch. 415.
114. Reedie *v.* London and South-Western R. C., 4 L. J., Exch. 244.
115. Suth. Dig. Indian L. R. (Calcutta) 282; 6 W. Rep. 101.
116. Lumsden *v.* London and North-Western R. C., 16 L. T. 609.
117. Buck *et uxor v.* London and North-Western R. C., 'Times' L. R., April 26, 1880.
118. Moore *v.* Metropolitan R. C., 8 L. R., Q. B. 36.
119. Edwards *v.* London and North-Western R. C., 5 L. R., C. P. 445.
120. Duckworth *v.* Johnson, 4 H. & U. 653.
121. Franklin *v.* South-Eastern R. C., 3 H. & N. 211; 4 Jur. 565.
122. Bird *v.* Great Northern R. C., 28 L. J., Exch. 3.
123. Dawson *v.* Manchester, Sheffield, and Lincolnshire R. C., 5 L. J., Exch. 682.
124. Carpue *v.* London and Brighton R. C., 5 L. J., Q. B. 747.
125. Jackson *v.* Metropolitan R. C., 2 L. R., C. P. 125; Robson *v.* North-Eastern R. C., 2 L. R., Exch. 248.
126. Lewis *v.* London Chatham and Dover R. C., 43 L. J., Q. B. 8; Cockle *v.* South-Eastern R. C., 41 L. J., C. P. 140.
127. Howe *v.* South-Eastern R. C., 'Times' L. R., May 3, 1880.
128. Weller *v.* London Brighton and South Coast R. C., 43 L. J., C. P. 137.
129. Stockdale *v.* Lancashire and Yorkshire R. C., 8 L. J., Exch. 289.
130. Evans *et uxor v.* Liverpool Omnibus and Tramways Co., 'Times' L. R., April 24, 1880.
131. Foy *v.* London Brighton and South Coast R. C., 18 C. B. 225.
132. Rigg *v.* London Sheffield and Lincolnshire R. C., 12 Jur. C. P. 525.
133. Foulkes *v.* Metropolitan District R. C., 42 L. T., C. P. 345.
134. Cranfield *et uxor v.* London Brighton and South Coast R. C., 'Times' L. R., April 7, 1880.

135. Harrold *v.* Great Western R. C., 14 L. T. 440.
136. Curtis *v.* Drinkwater, 2 B. & Ad. 169.
137. Broom's Phil. of Law, 157.
138. Nicholson *v.* Lancashire and Yorkshire R. C., 34 L. J., Exch. 84.
139. Paddock *v.* North Eastern R. C., 16 L. T. 639.
140. Lee *v.* Great Northern R. C., 'Times' L. R., Dec. 10, 1879.
141. Crafter *v.* Metropolitan R. C., 35 L. J., C. P. 132.
142. Longmore *v.* Great Western R. C., 19 C. B. 182.
143. Birkett *v.* Whitehaven Junction R. C., 4 H. & N. 730.
144. Potts *v.* Port Carlisle Dock and R. C., 2 L. J., Q. B. 283.
145. Griffiths *v.* London and North-Western R. C., 14 L. J., Exch. 797.
146. Ellis *v.* Great Western R. C., 9 L. R., C. P. 551.
147. Stapley *v.* London Brighton and South Coast R. C,. 4 H. & C. 93.
148. Stubley *v.* London and North-Western R. C., 4 H. & C. 83.
149. Skelton *v.* London and North-Western R. C., 16 L. T. 563.
150. Walker *v.* Midland R. C., 14 L. J., Exch. 796.
151. Peters *v.* Metropolitan R. C. (*Supreme Court App.*), 'Times' L. R., April 13, 1880.
152. Stokes *v.* Saltonstalt, 13 Peters 181; Waland *v.* Elkins, 1 Stark, 272.
153. Brown *v.* North Metropolitan Tramways Co., 'Times' L. R., June 23, 1880.
154. Simson *et uxor* *v.* London General Omnibus C., 8 L. R., C. P. 390.
155. Robinson *et uxor* *v.* North Metropolitan Tramways Co., 'Times' L. R., June 23, 1880.
156. Ames *v.* Great Eastern R. C., 'Times' L. R., June 11, 1880.
157. Alton *v.* Midland R. C., 34 L. J., C. P. 292.
158. Ford *v.* London and South-Western R. C., 2 F. & F. 730.
159. Richard *v.* Great Northern R. C., 7 C. B. 839.
160. Indian Railway Act (1879), s. 12.
161. Robinson *v.* Dunmore, 2 B. & P. 419; Great Northern R. C. *v.* Shepherd, 8 L. J., Exch. 30.
162. Le Conteur *v.* London and South-Western R. C., 6 B. & S. 961.
163. Phelps *v.* London and North-Western R. C., 19 C. B. 321.

164. Belfast and Ballymena R. C. *v.* Keep, 9 House of Lords Cases, 556.
165. Macrow *v.* Great Western R. C., 40 L. J., Q. B. 300; 6 L. R., Q. B. 612.
166. Jadul Singh *v.* Thomson, 11 H. C. R. (N. W. P.) 237.
167. *Ibid.*
168. Post-Master Bareily *v.* Earle, Sp. App. H. C. R. (N. W. P.) 1871, 195; Peninsular and Oriental Steam Nav. Co. *v.* Secretary of State for India, 7 Bourke's Rep. 167.
169. Ross *v.* Hill, 2 C. B. 877.
170. Richards *v.* London Brighton and South Coast R. C., 7 C. B. 839; Great Western R. C. *v.* Goodman, 21 L. J., C. P. 197.
171. Glover *v.* London and South-Western R. C., 37 L. J., Q. B. 57.
172. Richards *v.* London Brighton and South Coast R. C., *supra.*
173. Wolf *v.* Summers, 2 Camp. 631; Sunholf *v.* Alford, 3 M. T. W. 354.
174. Higgins *v.* Bretherton, 5 C. & P. 2.
175. Rumsey *v.* North-Eastern R. C., 32 L. J., C. P. 245.
176. Hearn *v.* London and South-Western R. C., 10 L. J., Exch. 793.
177. Mytton *v.* Midland R. C., 28 L. J., Exch. 385.
178. Walker *v.* Jackson, 10 M. & W., 161; Stuart *v.* Crawley, 2 Stack, 323.
179. H. H. Nawah Shahjehan, Begum of Bhopal *v.* Great Indian Peninsular R. C., High Court Rep. (Bombay) App. 324, of 1876.
180. Lyell *v.* Gunga Dhai, High Court Rep. 1876 (N. W. P.), 111.
181. Henderson *v.* Stevenson, 32 L. J. (House of Lords), 709.
182. Parker *v.* South-Eastern R. C., 32 L. J., 540.
183. Wilton *v.* Royal Atlantic Steam N. C., 30 L. T., C. P. 369.
184. Moritt *v.* North-Eastern R. C., 34 L. T., Q. B. 94.
185. Marshall *v.* York Newcastle and Berwick R. C., 11 C. B. 655; Beecher *v.* Great Eastern R. C., 5 L. R., Q. B. 241.
186. Denton *v.* Great Northern R. C., 5 E. & B. 860.
187. Hurst *v.* Great Western R. C., 34 L. J., C. P. 264.
188. Broom's Phil. of Law, 152.
189. Hurst *v.* Great Western R. C., *supra.*

190. Prevost *v.* Great Eastern R. C., 13 L. T. 20.
191. Denton *v.* Great Northern R. C., 5 E. & B. 860.
192. Le Blanch *v.* London and North-Western R. C., 1 L. R., C. P. 286.
193. Hamlin *v.* Great Northern R. C., 1 H. & N. 408.
194. Thomson *v.* Midland R. C., 34 L. T., Q. B. 34.
195. Story on Bailments, S. 603.
196. Ker *v.* Mountain, 1 Esp. 27.
197. Indian Railway Act (1879), s. 19; Chitty on Carriers, 293.
198. Railway and Canal Traffic Act of 1854.
199. *Ibid.*
200. Indian Contract Act (1872), s. 20.
201. Indian Railway Act (1879), s. 18.
202. Cranston *v.* Marshall, 5 L. Rep., Exch. 395; Indian Contract Act (1872), s. 55.
203. Indian Railway Act (1879), s. 20.
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207. Regg *v.* Mann, 23 L. T., 12.
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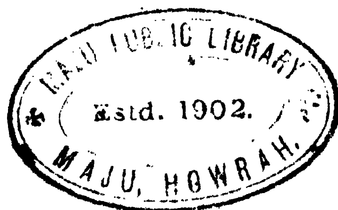
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553. *Ibid.* s. 20.
554. De Souza *v.* Coles, 3 H. C. R. (Madras) 384; Luckmee Chund *v.* Zorawur Mull, 8 Moo. J. A. 291; Pattavary Mudali *v.* A. Mudali, 5 H. C. R. (Madras) 420.
555. Premshook *v.* Bheekoo, 4 H. C. R. (N. W. P.) 941.
556. Barnes *v.* Marshall, 21 L. J., Q. B. 388.
557. Kemp *v.* Clark, 12 Q. B. 647.
558. Indian Contract Act (1872), s. 91.
559. Civil Procedure Code (Act x. of 1877), ss. 48, 49, 50.
560. *Ibid.* ss. 110, 114, and 115.

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LONDON: PRINTED BY
SPOTTISWOODE AND CO., NEW-STREET SQUARE
AND PARLIAMENT STREET